No.

92-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LILLIAN MCCOVEY SHERMOEN, ET AL.,

Petitioners.

V.

UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Interior; EDDIE BROWN, Assistant Secretary of the Interior/Indian Affairs; RONALD M. JAEGER, Area Director, Sacramento Office, Bureau of Indian Affairs; VIRGIL AKINS, Superintendent, Northern California Agency, Bureau of Indian Affairs; DALE RISLING, SR., ROBERT D. HOSTLER, CLIFFORD LYLE MARSHALL, and JOHN M. SCOTT.

Respondents.

Petition For a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the district court decide the constitutionality of the Hoopa-Yurok Settlement Act of 1988 in an action against the United States, when Indian tribes affected by the statute were not also defendants?

2. Does the public rights exception to usual rules of joinder under Fed.R.Civ.P. 19 permit a constitutional challenge to a federal statute in the absence of an Indian tribe that claims benefits from that statute?

3. Does Indian tribal sovereign immunity prevent a suit against tribal officials when only equitable relief is sought, the officials' only claim to lawful authority for their actions is an allegedly unconstitutional federal statute, and the litigation's only purpose is to challenge that statute?

PARTIES BELOW

Plaintiffs-petitioners herein: Lillian McCovey Shermoen; Carol Leigh McConnell Ammon; Leslie Ammon; Elsie McCovey Bacon; Gaylon Robert Bacon; Joseph K. Bacon; Raymond E. Bacon; George Clifford Bailey, Sr.; Ethel Mae Blake; Clarann C. (Ragain) Bray; Mary L. Carroll; Ora Collins; Dennis Costa; Joanne Barbara Wilder Costa; Barney Alva Curtice; Frank Benjamin Dowd; Gerald Ieshh Dowd; Kathy Noreen Dowd; Rocky Twa-Gah Dowd; Venola Dowd; Ollie Roberts Sorrell Foseide; Eileen Renee (Ragain) George; Frank Gist; Bonita Bacon Green; Janice Marie Greene; Earl Griffith; Colleen Guido; Dorothy Harriett Williams Haberman; Richard Lee Haberman; Mary Louise Hall; Evelina Hoffman; Linda Lee Hoffman; Virginia Howerton; Martin Kinder; Rachel Louise Knight; Pauline Rogers Kothman; Axel Roderick Lindgren; Marilyn Kay Lunsford; Ardith Evelyn McConnell; Howard Duane McConnell; Michael McConnell; Robert Brian McConnell; Allen McCovey, Sr.; Beatrice Violet McCovey; Darrell McCovey; Frank Lynn McCovey; James L. McCovey; Loren Gerhad McCovey; Vada Norma John McCovey; Vlayn Dene Harvill McCovey; David Edgar McLaughlin; Thelma Wilma McLaughlin; Gertrude Viola Mollier; Carol Griffith Moon; Edward Michael Moore; Lena Isle Nicholson; David O'Neill; Ellen J O'Neill; Herbert Lincoln O'Neill; Barbara D. Orcutt; Lawrence E. Orcutt; Bernice Jean Roubidoux; Darlene Marie Roubidoux; Peggy Joyce Sanderson, John Denton Simpson, II; Vivian Kay Simpson; Alberta Sylvia; Maria Eileen Tripp; Georgiana Trull; Lena Cleveland Wilder; the Coast Indian community of Yurok Indians of the Resighini Rancheria, a federally-recognized tribe.

Of the above-named individuals, Clarann C. (Ragain) Bray, Allen McCovey, Sr., and Vada Norma John McCovey, are deceased. They were plaintiffs when the action was filed on August 28, 1990, in United States District Court

Defendants-appellees-respondents are named in the caption.

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No. 92-

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v.

United States of America; The United States Department of Interior, Bureau of Indian Affairs; Bruce Babbitt, Secretary of the Interior; Eddie Brown, Assistant Secretary of the Interior/Indian Affairs; Ronald M. Jaeger, Area Director, Sacramento Office, Bureau of Indian Affairs; Virgil Akins, Superintendent, Northern California Agency, Bureau of Indian Affairs; Dale Risling, Sr., Robert D. Hostler, Clifford Lyle Marshall, and John M. Scott.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the Coast Indian Community of Yurok Indians of the Resighini Rancheria, a federally-recognized Indian tribe, and individual Indians of the former joint Hoopa Valley Reservation in California, request a writ of *certiorari* to review the judgment and opinion entered by the United States Court of Appeals for the Ninth Circuit in this action on December 24, 1992.

OPINIONS BELOW

The onion of the court of appeals is reported at 982 F.2d 1312 (9th Cir. 1992) and is reprinted in the Appendix (App. A, *infra*). The judgment and opinion of the United States District Court for the Northern District of California entered May 24, 1991, and that court's July 10, 1991, order from the bench denying petitioners' motion for leave to amend, are not reported, but they are also reproduced in the Appendix (App. B, *infra*).

JURISDICTION

This Court's jurisdiction is pursuant to 28 U.S.C. §1254 (1).

RULES, CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

1. Rule 19 of the Federal Rules of Civil Procedure is reproduced in full in the Appendix (App. C, infra).

2. The United States Constitution provides in Article I, § 8, clause 3:

> The Congress shall have power. . .to regulate commerce . . . with the Indian tribes. . .

Amendment I provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Hoopa-Yurok Settlement Act of 1988, P.L. 100-580, as amended by P.L. 101-301 (25 U.S.C. § 1300i, *et seq.*) is set forth in full in the Appendix (App. D, *infra*).

STATEMENT

In this action, the court of appeals affirmed the dismissal of petitioners' challenge to the constitutionality of the Hoopa-Yurok Settlement Act (the "Act"). The Act split the Hoopa Valley Reservation in northern California, giving the Hoopa Valley Tribe exclusive rights in approximately 90,000 contiguous acres of timber land, which constitutes 96 per cent of the total unallotted acreage held in trust in the former joint reservation.[1]

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[1]Before the split, the reservation was shaped like a "square skillet with an extraordinarily long handle." *Short v. United States*, 486 F.2d 561, 562 (Ct. Cl. 1973), *cert. denied* 416 U.S. 961, *reh. denied*, 417 U.S 959 (1974) *("Short")*. A map of the reservation as it existed pre-Act appears in App. E, *infra;* the same map is reproduced in the appendix to the Court's opinion in *Mattz v. Arnett*, 412 U.S. 481 (1973).

The Act also radically reordered tribal membership and tribal government for most of the Indians of the reservation, even coercing Indians of one tribe to join a second tribe or else lose all reservation rights. Petitioners allege that Congress thereby deprived them of political and property rights in violation of the Indian Commerce Clause (Art. I, § 8, cl. 3), and the right to freedom of association, the rights to due process and equal protection, and the prohibition against taking of property for a nonpublic purpose.

The court of appeals held that the action could not proceed in the absence of the Hoopa Valley Tribe and the Yurok Tribe, because the absent tribes were indispensable parties which could not be joined because of their sovereign immunity, and that in "equity and good conscience" the suit must be dismissed under Fed.R.Civ.P. 19. The court rejected petitioners' arguments that the United States could adequately represent the absent tribes' interests, and that four present or former members of the Hoopa Valley Tribal Council, the Hoopa Valley Tribe's governing body, who had intervened as defendants, could adequately represent their tribe's interests. The court held that the public rights exception to Rule 19 does not apply in this action despite the fact that all of petitioners' claims are based on the Constitution. Finally, the court denied petitioners' request to amend their complaint by naming the Yurok Tribe and tribal officers of both the Hoopa Valley and Yurok tribes as defendants in order to cure the supposed defect of parties.

The Hoopa Valley Reservation was established in accordance with the Act of April 8, 1864 (13 Stat. 39, *et seq.*), which authorized the President to create up to four reservations in California. Numerous tribes, bands, and groups of Indian people were located there; it was not established for any single tribe in particular. Before the Hoopa-Yurok Settlement Act, all Indians of the reservation communally enjoyed equal rights in the entire reservation's unallotted trust lands and resources. An Indian of the reservation's rights did not depend on whether his or her particular tribe was politically organized and/or federally-recognized.

In 1950, a minority of Indians of the reservation, including members of various tribes, organized a single political tribal group, the Hoopa Valley Tribe, which the federal government then recognized as an Indian tribe. *Hoopa Valley Tribe v. United States*, 596 F.2d 435, 441 (Ct. Cl. 1979). (Hoopa Valley Tribe not a tribe from time immemorial.) This small group adopted intricate membership rules designed to exclude most of the Indians of the reservation. The majority of the excluded group belonged to the federally recognized (but politically unorganized) Yurok Tribe[2]; the ratio of persons in the excluded group to members of the Hoopa Valley Tribe, according to Bureau of Indian Affairs (BIA) statistics, is approximately 2:1. *See id.* at 440. Yuroks have always lived on all parts of the former joint reservation. *See Short v. United States*, 486 F.2d at 564-66.

The Hoopa Valley Tribe unsuccessfully argued in actions in the Court of Claims and United States District Court over the years that it had sole title to the Square, but the courts uniformly rejected such arguments:

> The Yuroks were co-beneficiaries with the Hoopas on a per capita, equal basis of the trust [*i.e.*, the reservation's unallotted trust lands, resources, and resource revenues] administered by the United States.

Hoopa Valley Tribe v. United States, 596 F.2d at 442.[3]

The Act's basic purpose was to benefit the Hoopa Valley Tribe with property and funds, as Congress often benefits other politically favored special interest groups. In splitting

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[2]Yuroks are also referred to as Klamath River Indians. *Mattz v. Arnett*, 412 U.S. at 484.

[3]In its opinion below, the court of appeals misleadingly implies that *Short* and related litigation was unsettled, so that Congress had to enact legislation to resolve issues that were in dispute. App. A at 3a, 6a. On the contrary, the Claims Court had finally decided all essential issues that relate to the question of who owned the reservation. *Hoopa Valley Tribe v. United States*, 596 F.2d at 437 (*Short* has *res judicata* and collateral estoppel effect). The Act deliberately overturned this settled law, to give the Hoopa Valley Tribe valuable property to which it was not entitled under the court decisions.

the reservation, Congress gave the Hoopa Valley Tribe sole ownership of the heavily-timbered 144-square mile "Square," including the 90,000 acres mentioned above. In contrast, the split left the mostly Yurok majority group with approximately 3,600 acres of land in small, fragments in an area along the Klamath River known as the "Extension" or "Addition." The Yuroks and others in the majority group were neither provided nor promised compensation by Congress for this total confiscation of their rights in the "Square."[4]

Without Yurok consent, the Act arbitrarily sets membership requirements for the Yurok Tribe so that persons with no Yurok ancestry whatsoever must be allowed to join. Under the Act, the Hoopa Valley Tribal Council participates in deciding who may qualify for the so-called "Settlement Roll," and thus who may be included on the initial membership roll of the Yurok Tribe. 25

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[4]Petitioners allege that this case involves a taking of petitioners' property for a non-public purpose; that is, the taking benefits the Hoopa Valley Tribe in particular, as opposed to the public in general. No compensation will adequately remedy such takings; they are flatly prohibited. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984). Thus petitioners do not have an adequate remedy in the Claims Court, contrary to what the court of appeals seems to suggest. App. A at 15a. But the Ninth Circuit would use Rule 19 to preclude judicial review in United States District Court, thus making the prohibition against non-public purpose takings worthless because it cannot be enforced.

Even if the Act is construed to effect a public-purpose taking, it violates the fifth amendment because it fails to provide a means for obtaining just compensation. *See Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990) (fifth amendment requires Congress to provide reasonable, certain, and adequate provision for compensation at time of taking). Uncompensated takings are unconstitutional. *See Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 297, n. 40 (1981), citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94, n. 39 (1978), *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125-36 (1974), *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697, n. 18 (1949). The Act precludes monetary relief for a taking through an elaborate and cynical scheme whereby the affected Indians are deemed to waive their rights. *E.g.*, 25 U.S.C. § 1300i-5(c)-(d). The Act coerces the Yurok Tribe itself to waive any compensation claim. 25 U.S.C. § 1300i-1(c)(4). Thus, the Act is intended to deny petitioners a Claims Court remedy for a public purpose taking.

To be sure, the Yurok Tribe has not waived its claims, but it is thus deprived of significant funds and organizational authority that depend on a

U.S.C. § 1300i-4(d)-(e) (initial membership roll of Yurok Tribe limited to persons listed on Settlement Roll).[5] Congress dictated a form of government for the Yurok Tribe, including the number of persons (five) who shall comprise the "interim" tribal council, and the scope of tribal business that this council may conduct. 25 U.S.C. § 1300i-8. Congress also dictated that persons who do not join the Yurok Tribe would lose all rights in the Extension that they formerly enjoyed, whereas before the Act, neither membership in the Yurok nor any other particular tribe was necessary for an Indian of the reservation to enjoy such rights.

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waiver of claims. The funds that are being withheld are the reservation timber revenues that the BIA escrowed for the Yuroks beginning in 1974, as explained in *Hoopa Valley Tribe v. United States*, and to which the court of appeals refers. App. A- at 5a. Thus, the funds are not compensation for a taking; they are part of the property that Congress has taken from the Yuroks in the Act.

There are currently two cases pending in the Claims Court alleging that the Act is a taking of Yurok property: *Yurok Tribe v. United States* (no. 92-173L), and *Ammon v. United States* (no. 91-1432L). These actions do not change the point made above that the Claims Court is an inadequate forum for petitioners' grievances.

This case should not be viewed as primarily a takings case. Petitioners' taking claims are substantial and important, but so are petitioners' other constitutional claims, based on the Due Process Clause, the right to freedom of association under the first amendment, and the limitations on congressional power inherent in the Indian Commerce Clause. The violations of petitioners' rights based on these constitutional provisions are not remediable in the Claims Court. In leaving plaintiffs without a remedy, the court of appeals slighted a basic policy underlying Fed. R. Civ. P. 19(b), which is that an action should not be dismissed for non-joinder if that would leave the plaintiffs without an adequate remedy.

[5]Petitioners allege that it violates the Due Process Clause to include the Hoopa Valley Tribe's governing council in the decision-making process regarding the Settlement Roll. The Hoopa Valley Tribe has a direct financial interest in limiting the number of persons who qualify for the Settlement Roll. The fewer persons who qualify, the more money the Hoopa Valley Tribe gets from the "Settlement Fund." 25 U.S.C. § 1300i-3(c). *See Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986) (judge with direct financial stake in the outcome of a decision is disqualified from participating, or else the decision must be vacated).

The Act is especially harsh in dealing with the pre-existing rights of members of petitioner Coast Indian Community to use and benefit from the Extension in particular, for it requires members of this federally-recognized tribe to join a second tribe, the Yurok Tribe, or lose all such rights. Thus, the Act deprives Yurok tribal members and non-members alike of their invaluable right to self-determine tribal membership, their right to self-govern, and their right to significant economic opportunities that came from the reservation lands, resources, and funds that Congress took away.

On August 28, 1990, the present action was filed in the United States District Court for the Northern District of California for declaratory and injunctive relief to invalidate the Act as unconstitutional.[6] The defendants, respondents here, are the United States, the BIA, the Secretary of the Interior, and subordinate BIA officials responsible for administering the Act. On November 19, 1990, four members of the Hoopa Valley Tribal Council filed an answer in intervention and counter-claimed for "slander of title," that being the Hoopa Valley Tribe's so-called title to the Square. These intervenors specifically identified the "financial interests of the Tribe and its members" among the interests that they sought to vindicate. They also are respondents here.

The court of appeals correctly characterized the nature of petitioners' claims:

> Appellants assert that, by extinguishing their interest in in the Square and conferring exclusive right to the Square on the Hoopa Valley Tribe, the Act effects a taking of property for a non-public purpose and without just compensation in violation of the Fifth Amendment. They also allege a violation of their First Amendment right of freedom of association in that the Act allegedly forces Native Americans of diverse tribal affiliations to associate

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[6]Lower court jurisdiction is pursuant to 28 U.S.C. § 1331 (general federal questions) as to all petitioners, and also is pursuant to 28 U.S. C. § 1362 (suits by federally-recognized Indian tribes) as to petitioner Coast Indian Community of Yurok Indians of the Resighini Rancheria.

> in a single, politically determined tribe in order to retain their interest and rights in the reservation. See 25 U.S.C. § 1300i-5(d) (3). Appellants also contend that Congress exceeded its constitutional authority to govern the Indian Tribes by dictating tribal membership, forms of tribal government, and means of tribal organization, and by interfering with the sovereignty of the Coast Indian Community of the Resighini Rancheria. Finally, appellants charge that the Act derogates their Fifth Amendment right to equal protection of the law by illegitimately preferring members of the Hoopa Valley Tribe over other Indians of the reservation.

App. A at 6a.

The declaratory and injunctive relief that petitioners seek would prevent the BIA from implementing the Act, from treating the reservation as other than a single, unified reservation, and from pursuing policies favoring the Hoopa Valley Tribe to the detriment of petitioners and other Indians of the reservation who do not belong to that tribe. The action does not include any claim for money damages. The requested relief does not require the disposition of sovereign property, but only requires that the joint reservation be administered in accordance with pre-Act law and the Constitution.

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES IMPORTANT ISSUES ABOUT THE POWER OF FEDERAL COURTS TO REVIEW THE CONSTITUTIONALITY OF ACTS OF CONGRESS AFFECTING INDIAN SOVEREIGNTY AND LANDS.

The court of appeals' decision raises three important issues for Indians and non-Indians alike: (1) Should Fed.R.Civ.P. 19 be interpreted to prevent courts from reviewing unconstitutional federal legislation when the legislation benefits an Indian tribe; (2) does the public rights exception to usual rules of joinder under Rule 19[7] permit a constitutional challenge to a

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[7]*See National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940), discussed in § III, *infra*.

federal statute in the absence of Indian tribes who claim benefits from the statute; and (3) does tribal sovereign immunity preclude suits against tribal officials acting pursuant to an unconstitutional federal statute? This Court has never squarely addressed these questions.

The right to judicial review of federal statutes affecting Indian tribes is unsettled; the court of appeals' decision makes the very existence of that right questionable. The court of appeals applied Rule 19 so as to preclude any such review. It made a remarkable admission: "We realize that our decision effectively denies [petitioners] a forum . . ." for their constitutional grievances. App. A at 15a. Such a decision is possible only because the court of appeals departed sharply from standards that should govern the lower courts in deciding necessary and indispensable party status.

The court of appeals' strained interpretation of Rule 19 forecloses judicial review of legal issues of great concern to all Indian tribes. A legally protected land base and a strong tribal government are essential to the cultural and political survival of Indian tribes today. Moreover, the federal government must necessarily rely on tribal governments for the effective administration of federal policy. The court of appeals' decision undermines these important federal interests by denying judicial review when acts of Congress deprive tribes of their land and abrogate their sovereignty.

Judicial review of congressional acts affecting tribes is also important for non-Indians to prevent Congress from abusing its power, especially where lands and resources are concerned. The court of appeals' rationale would insulate any number of congressional actions from judicial scrutiny (and the protection for the public that judicial review ensures) when such actions, even if only marginally, benefit a tribe, because tribes are said to be indispensable parties, and they cannot be sued unless they consent. For example, Congress is presently studying a controversial proposal to transfer 500,000 acres near Flagstaff, Arizona to the Hopi Tribe, including federal, state and private holdings as part of a final settlement of the so-called Hopi-Navajo

dispute.[8] This proposal, if enacted, would not be reviewable under the court of appeals' rationale unless both of the affected tribes consented to be sued. Such joint consent may be unlikely.

The questions this case presents go to the heart of the separation of powers. The court of appeals' decision effectively turns all questions about federal statutes that affect Indian tribes into non-justiciable political questions. This is at odds with the federal judiciary's long-settled authority to review the constitutionality of all congressional acts. Congressional enactments concerning Indian tribes are reviewed on constitutional grounds. *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84-85 (1977). The political question doctrine does not apply to relations between Congress and the Indian tribes. *United States v. Sioux Nation,* 448 U.S. 371, 413 (1980). Certainly, Fed.R.Civ. P 19 cannot be the basis for an exception to this rule.

At bottom, the court of appeals' decision in the present case is simply unfair. The government here has diminished petitioners' rights in land (*i.e.,* the former Hoopa Valley Reservation in which all Indians of the reservation, and not just Hoopa Valley Tribe members, had equal rights). It has forced them to associate for political purposes in ways that they did not choose, dictating tribal membership and the structure and scope of tribal government. Immunizing these congressional actions from judicial review is inconsistent with the courts' treatment of such actions concerning non-Indian property and political rights. No such disparity should be tolerated by this Court.

II. THE COURT OF APPEALS CREATED A NEW RULE WHICH PRECLUDES SUITS FOR INJUNCTIVE RELIEF AGAINST TRIBAL OFFICIALS ACTING PURSUANT TO UNCONSTITUTIONAL STATUTES.

The court of appeals has created an exception to the rule that government officers generally are subject to equitable remedies in federal court when their activities violate federal law. Specifically, the exception is for tribal government

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[8]Benedek, *No More War Forever,* **Newsweek,** March 8, 1993, at 58.

officials. The court of appeals held that tribal sovereign immunity precludes suits against tribal officials when the requested relief would create an "intolerable burden on [tribal] governmental functions." App. A at 14a. For the court of appeals, this exception applies even when tribal officials act under an unconstitutional federal statute. There is no basis for this exception in Supreme Court precedent, nor should there be such an exception -- certainly not one that depends on an "intolerable burden" test.

Review by this Court is needed to clarify that tribal sovereign immunity does not preclude suits against Indian tribal officials when only equitable relief is sought, their only claim to lawful authority for their actions is an allegedly unconstitutional federal statute, and the sole purpose of the litigation is to challenge that statute. Tribal officials must be accountable the same as other government officials are accountable.

The rule permitting officer suits for injunctive relief "emerged from harsh reality" in the common law. *See* 12 J. Moore, H. Bendix, B. Ringle, *Moore's Federal Practice* para. 300.03 [4-1] (1990). It rests on a legal fiction that suits against officers are not against the sovereign; if this fiction had not developed, the king would have been unaccountable to his subjects. *Id.* In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that state officials are not immune from suits to enjoin the implementation of unconstitutional statutes, the theory being that a state official could not be immunized for performing an act that the state itself was powerless to perform, and therefore the suit is not a suit against the sovereign. *See also, Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S 682, 690 (1949) (in suits alleging unconstitutional action, "the conduct against which specific relief is sought is beyond the officer's powers and, is therefore, not the conduct of the sovereign.").

This Court suggested that the *Ex parte Young* doctrine applies to tribal officials in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1977), holding that an officer of a tribal pueblo is subject to suit for *habeas corpus* relief under the Indian Civil

Rights Act, 25 U.S.C. § 1301-1303. A straightforward application of the *Ex parte Young* rule in the case at bar would cure any defect of parties, if, *arguendo*, one assumes there was such a defect. But the district court and court of appeals concluded that the rule does not apply because it violates tribal sovereign immunity.[9]

The court of appeals employed a balancing test that forecloses injunctive suits if they would create intolerable burdens on tribal government functions. This is not the law in any other circuit.[10] The court of appeals' novel formulation of the officer suit doctrine is so vague that it cannot be applied evenhandedly. This Court's guidance is needed to correct the

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[9]This holding was possible notwithstanding *Santa Clara Pueblo* because *Ex parte Young* was not a *habeas corpus* action, so the Court's reference to *Ex party Young* in *Santa Clara Pueblo* can be read as *dictum*. But the court of appeals' holding is illogical and sets a dangerous precedent. Judge Norris said in *State of California v. Harvier*, 700 F.2d 1217, 1224 (9th Cir. 1983) (Norris, J., dissenting), "Although I am hesitant to construe *Martinez* as a clear holding that *Ex parte Young* applies to Indian tribes . . . both public policy and that the jurisprudence of sovereign immunity compel that result." Indeed, in *Oklahoma State Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,_____U.S._____, 111 S.Ct. 905, 912 (1991) (Stevens, J., concurring), it was suggested that sovereign immunity does not bar suits against even the tribe itself when only equitable relief is sought.

[10]The Ninth Circuit's theory apparently derives from *State of Washington v. Udall*, 417 F.2d 1310, 1318 (9th Cir. 1969). It is not grounded in this Court's opinions. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11 (1949), refers to a narrow class of actions which may fail "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." But nowhere is this limitation said to be subject to a balancing test. *See also Dugan v. Rank*, 372 U.S. 609, 620-21 (1963). Although the Court has barred officer suits that would "stop the government in its tracks," *id.*, this simply means that courts may not interfere with the exercise of discretion by officials who are lawfully empowered to exercise it; it does not mean that officials may violate federal constitutional rights if an order requiring them to stop would be an "intolerable burden." At any rate, the petitioners here ask only that the government stop violating the Constitution; no disposition of sovereign property is involved, because the reservation will continue to operate as it did before the Act if petitioners prevail.

court of appeals' misreading of the officer suit doctrine in Indian affairs. Important rights of judicial review depend on the availability of suits against tribal officers for injunctive relief.

Unlike the Ninth, other circuits clearly allow suits to test the legality of actions by tribal officers. For example, in *Wisconsin v. Baker,* 698 F.2d 1323 (7th Cir.) *cert. denied* 463 U.S. 1207 (1983), suit was upheld to enjoin tribal officers from exercising exclusive jurisdiction over hunting and fishing in certain navigable lakes in Wisconsin. The court cited *Ex parte Young,* holding that a tribal officer is stripped of immunity "whenever he exercises a power that his tribe was powerless to convey him," such as a power to violate the Constitution, or a power beyond the scope of those delegated by the tribe. 698 F.2d at 1332.

Likewise, *Tenneco Oil Company v. Sac and Fox Tribe,* 725 F.2d 572 (10th Cir. 1984), sanctioned tribal officer suits without adopting the intolerable burden standard. The court held that tribal sovereign immunity does not preclude a suit against tribal officers to enjoin licensing and taxation ordinances, when they are alleged to have acted beyond the authority the tribal sovereign is capable of bestowing.

But the Ninth Circuit holds that tribal officials share the tribe's sovereign immunity from unconsented suit, *Imperial Granite Company v. Pala Band of Indians,* 940 F.2d 1269, 1272 (9th Cir. 1991). For all practical purposes, this eliminates officer suits in the Ninth Circuit.[11]

This Court's intervention in the present action will bring

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[11] In *Imperial Granite*, the court refused to allow an officer suit to determine whether tribal officials acted lawfully in blocking the company from its quarry on fee-patented land within the boundaries of a reservation. Another panel of the Ninth Circuit than the one that decided the case at bar appears to have held that tribal sovereign immunity does not foreclose equitable relief against tribal officials acting under color of an unconstitutional federal statute. *Burlington Northern v. Blackfeet Tribe,* 924 F.2d 899, 901 (9th Cir. 1991) *cert. denied* _____U.S._____, 112 S.Ct. 3013 (1992). However, in the present action, the court of appeals characterized this as "broad dicta." App. A at 13a. *Dictum* or not, the Ninth Circuit in *Burlington Northern* clearly understood that it had never before squarely decided whether the doctrine of *Ex parte Young* applies to tribal officials. 924 F.2d at 901.

about a uniform body of law permitting tribal officer suits where unconstitutional conduct is alleged; public policy and the jurisprudence of sovereign immunity compel this. It was error to deny petitioners' motion for leave to file an amended complaint adding the Yurok Tribe and Hoopa Valley and Yurok tribal governing officials. For this reason alone, the court of appeals' decision should be reversed.

III. THE COURT OF APPEALS FUNDAMENTALLY MISCONSTRUED THE PUBLIC RIGHTS EXCEPTION TO TRADITIONAL JOINDER RULES.

The court of appeals refused to apply the public rights exception to traditional joinder rules. The court conceded that this suit involves public rights, "[l]ike the interest in being governed by constitutional laws." App. A at 12a. But the court of appeals nevertheless refused to apply the public rights exception because the suit allegedly threatens the absent tribes' "legal entitlements." *Id.* This is a fundamental misunderstanding of the public rights exception. Review is necessary to clarify the exception and to bring the Ninth Circuit into conformity with this Court's rulings.

The public rights exception was established in *National Licorice Co. v. NLRB,* 309 U.S. 350, 363 (1940), which upheld an NLRB injunction against an employer, preventing the enforcement of contracts that constituted unfair labor practices. Notwithstanding usual joinder rules, the employees who were parties to the contracts did not have to be joined in the action. The public nature of the rights asserted -- compliance with federal fair labor laws -- justified the exception:

> In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights.

Id. The public right was "distinct and separate" from the private rights under the contracts, and overrode those private rights in the sense that "[i]t will not be open to any tribunal to compel the employer to perform the acts which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." *Id.* at 365.

Thus, under *National Licorice,* the public rights exception fully applies regardless of whether the public rights adjudication threatens the so-called private legal rights or entitlements of the absent parties. The court of appeals' opinion in the present case eviscerates the public rights exception because any public rights adjudication will somehow threaten the private interests or "rights" of absent parties. The court of appeals' strained interpretation flatly contradicts this Court's ruling in *National Licorice,* and, if not corrected, is likely to close the courthouse door to a wide range of significant public rights controversies.

The court of appeals' decision contains another serious analytical flaw which is inconsistent with this Court's precedents. The "legal entitlements" with which the court was concerned derive solely from the Hoopa-Yurok Settlement Act, the statute which the suit attacks; there are no independent private rights at stake. If the suit is successful and the Act is held to be unconstitutional, there are no "legal entitlements" in need of protection. Stated another way, such private rights of the absent tribes are not "rights" at all if the Act itself is unconstitutional. The court of appeals' reliance on "legal entitlements" to preclude application of the public rights exception thus begs the question.

The court of appeals' failure to apply the public rights exception is out of step with other circuits. For example, in *Kirkland v. New York State Department of Correction Services,* 520 F.2d 420 (2d Cir. 1975) *cert. denied* 429 U.S. 974 (1976), *reh. denied* 429 U.S. 1124 (1977), the exception was applied in a challenge to discrimination in a New York State Civil Service examination. The court rejected the argument that post-trial intervenors who had passed the exam were indispensable parties, so that the judgment should be vacated. The court relied on *National Licorice* for the principle that "[w]hen litigation seeks the vindication of a public right, third persons who may be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties." 520 F.2d at 424. Thus, the public rights exception was applied despite the adverse effect the adjudication may have had on the private rights of the intervenors. The same interpretation

of *National Licorice* is found in the Eleventh Circuit. See, *Jeffries v. Georgia Residential Finance Authority,* 678 F.2d 919, 929 (11th Cir.), *cert. denied* 459 U.S. 971 (1982). Review by this Court is necessary to establish a uniform interpretation of the public rights exception and to furnish appropriate guidance to the lower courts in its application.

IV. THE COURT OF APPEALS MISCONSTRUED THE UNITED STATES' TRUST RELATIONSHIP WITH INDIAN TRIBES AND DISREGARDED THE INTERESTS INVOLVED IN THIS CASE.

The court of appeals illogically concluded that the United States' representation of the absent tribes is inadequate for Rule 19 purposes, because of the "competing interests and divergent concerns" of the absent tribes, and also because of the United States' trust responsibilities towards the absent tribes. App. A at 10a. The court of appeals reached this conclusion even though the "United States might share the same ultimate goal as the absent tribes, namely that of vindicating the constitutionality of the Act . . ." *Id.* The court of appeals' decision makes no sense, because the only controversy in this litigation is whether or not the Act is constitutional. The absent tribes' claims that are at stake all derive from the Act. Therefore, if the Act is constitutional, these claims are fully vindicated. If the Act is unconstitutional, then the absent tribes' rights allegedly derived from the Act were never rights in the first place. It is thus impossible for the United States to have a conflict with the absent tribes in this situation, where its "ultimate goal" is "that of vindicating the constitutionality of the Act."[12]

The court of appeals' conclusion relies on a misapprehension of the United States' trust relationship with Indian tribes.

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[12]The court of appeals' opinion also seems to suggest that the United States does not adequately represent the absent tribes' interests because its trust responsibilities towards the petitioners create a conflict of interest. App. A at 10a. Obviously, there is a conflict between petitioners and the United States - petitioners are suing the United States. However, the United States' only relevant duty, for Rule 19 purposes, is to defend the Act against petitioners' challenge; thus, its representation of the absent tribes is fully adequate under Rule 19, notwithstanding that the petitioners also are an Indian tribe and Native American individuals.

The court of appeals incorrectly presumes that a general trust responsibility towards all Indians, or at least all tribes (including the tribes to which petitioners belong), makes it impossible for the United States to represent the interests of two or more tribes at once in the same case. But the mere fact that there is a trust relationship between the United States and tribes does not, without more, create legal duties and responsibilities; instead, such duties must derive from unambiguous language in treaties, statutes, and/or regulations. *See United States v. Mitchell*, 463 U.S. 206, 211 *et seq.* (1983) (federal government's duty to pay Indian allottees whose timber was mismanaged arises from particular statues or regulations, not from general trust relationship between federal government and Indians.) The Hoopa-Yurok Settlement Act, the only relevant statute, contains no language creating trust obligations that put the United States in conflict with the absent tribes. The fact that the two absent tribes may disagree with each other on a variety of political matters changes nothing for Rule 19 purposes.[13]

The court of appeals' analysis of the United States' representation of the absent tribes is at odds with this Court's directions concerning the nature of the trust relationship between the United States and Indian tribes. It fundamentally misapprehends the source of the federal

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[13]Obviously, because of the Act's confiscatory provisions, the Yurok Tribe well might oppose it. Petitioners filed a motion in the district court to join the tribe as a defendant, so that the tribe's voice could be heard on this issue. However, the district court denied that motion, and the court of appeals affirmed the denial. The basic point remains that to the extent that the tribe supports the Act, the United States shares the same goal of upholding it in the face of petitioners' attack, so that for purposes of Rule 19, the United States adequately represents the Yurok Tribe.

When the litigation began in August, 1990, the Yurok Tribe had no official membership roll or officially recognized tribal government (although it was a federally-recognized tribe). Petitioners argued that due to this inability to litigate, it was not a "person subject to service of process" and therefore, Rule 19 did not apply to the Yurok Tribe. But, by the time the litigation had progressed to the court of appeals, the Yurok Tribe had organized a tribal government. Thus, the Yurok Tribe might have consented to be sued inasmuch as three of five members of the Yurok Tribe Interim Governing Council elected pursuant to 25 U.S.C. § 1300i-8(b)-(c) are petitioners herein. The court of appeals unfairly denied the Yurok Tribe a chance to be heard on whether or not it wanted to participate in this litigation, even after the tribe had organized so that its voice could be heard.

government's legal duties and responsibilities toward tribes.

V. THE COURT OF APPEALS' REFUSAL TO RECOGNIZE THAT THE HOOPA VALLEY TRIBE'S INTERESTS ARE PROTECTED BY ITS OFFICERS SETS A DANGEROUS PRECEDENT.

Finally, there can be no serious question that the Hoopa Valley Tribe is adequately represented by the four intervenor-defendants (respondents herein), who include its present Chairman, another present member of its governing council, and two former members of its governing council (who at the time of intervention in November, 1990, were council members). The motion to intevene itself is the best expression of the intevernors' desire to represent their tribe. That motion declared that their purpose was to " . . . put forth to this Court [the Hoopa intervenors'] views and positions with respect to . . . a matter posing a direct threat to the economic development and well-being of all tribal members." The motion described the "principal interests at issue in this case" as:

> The division of the Hoopa Valley Tribe and the Yurok Tribe's reservations and sums of money which the United States intends to pay the Hoopa Valley Tribe and the Yurok Tribe from the Settlement Fund. These are the matters in which Hoopa tribal members have a direct and substantial interest.

The motion continued:

> This action questions the statutorily-secured right of the Hoopa Valley Tribal Council - on which the Hoopa defendants serve-to rule over the affairs of its reservation. *(sic)*

These passages show that the Hoopa respondents perceive their interest to be peculiarly tribal in nature.

The motion to intervene belies any argument that Hoopa respondents do not represent the Hoopa Valley Tribe. So does their counterclaim that petitioners "[h]ave slandered the title of the Hoopa Valley Tribe . . ."[14] It is nonsense to suppose that, having intervened expressly to protect tribal interests, they do

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[14]The fact that this counterclaim was voluntarily dismissed (App. A at 7a, n. 2) does not support the claim that they are not participating in this action on the Hoopa Valley Tribe's behalf.

not sufficiently advance these interests for Rule 19 purposes. As in its discussion of the United States' role towards the absent tribes, the court of appeals substitutes conclusion for logical analysis in discussing the Hoopa respondents' role.

The court of appeals improperly speculated in concluding that a potential conflict prevented adequate representation when there is no actual conflict. The Hoopa respondents' counsel also represents the Hoopa Valley Tribe in *Short* and related matters; if there were really a conflict of interest, he could not do so. This is directly at odds with the conclusion which the court of appeals reached, App. A at 10a-11a, that a potential conflict of interest precludes these individual respondents from adequately representing the Hoopa Valley Tribe for Rule 19 purposes.

The court of appeals' ruling, based on speculation about potential conflicts when no actual conflict exists, sets a dangerous precedent. The unfairness inherent in its failure to hold that the Hoopa respondents adequately protect their tribe's interests is but one more example of the court of appeals' overall hostility towards judicial review of congressional enactments benefitting tribes, without regard to who is harmed by those same enactments.

CONCLUSION

If left standing, the court of appeals' decision will have national ramifications. The court of appeals essentially decided that Fed.R.Civ.P. 19 forecloses judical review of congressional enactments in Indian affairs, unless all the affected tribes consent to be sued. This is contrary to the purpose of Rule 19, which is to ensure a just adjudication. A writ of *certiorari* to the court of appeals should issue, reversing that court's decision.

March 23, 1993 Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

LILLIAN MCCOVEY SHERMOEN; CAROL LEIGH MCCONNELL AMMON; LESLIE AMMON; ELSIE MCCOVEY BACON; GAYLON ROBERT BACON; JOSEPH K. BACON; RAYMOND E. BACON; GEORGE CLIFFORD BAILEY, SR.; ETHEL MAE BLAKE; CLARANN C. (RAGAIN) BRAY; MARY L. CARROLL; ORA COLLINS; DENNIS COSTA; JOANNE BARBARA WILDER COSTA; BARNEY ALVA CURTICE; FRANK BENJAMIN DOWD; GERALD IESHH DOWD; KATHY NOREEN DOWD; ROCKY TWA-GAH DOWD; VENOLA DOWD; OLLIE ROBERTS SORRELL FOSEIDE; EILEEN RENEE (RAGAIN) GEORGE; FRANK GIST; BONITA BACON GREEN; JANICE MARIE GREENE; EARL GRIFFITH; COLLEEN GUIDO; DOROTHY HARRIET WILLIAMS HABERMAN; RICHARD LEE HABERMAN; MARY LOUISE HALL; EVELINA HOFFMAN; LINDA LEE HOFFMAN; VIRGINIA HOWERTON; MARTIN KINDER; RACHEL LOUISE KNIGHT; PAULINE ROGERS KOTHMAN; AXEL RODERICK LINDGREN; MARILYN KAY LUNSFORD; ARDITH EVELYN MCCONNELL; HOWARD DUANE MCCONNELL; MICHAEL MCCONNELL; ROBERT BRIAN MCCONNELL; ALLEN MCCOVEY, SR.; BEATRICE VIOLET MCCOVEY; DARRELL MCCOVEY; FRANK LYNN MCCOVEY; JAMES L. MCCOVEY; LOREN GERHAD MCCOVEY; VADA NORMA JOHN MCCOVEY; VLAYN DENE HARVILL MCCOVEY; DAVID EDGAR MCLAUGHLIN; THELMA WILMA MCLAUGHLIN; GERTRUDE VIOLA MOLLIER; CAROL GRIFFITH MOON;

No. 91-16045

D.C. No.
CV-90-02460-WHO

OPINION

EDWARD MICHAEL MOORE; LENA ISLE NICHOLSON; DAVID O'NEILL; ELLEN J. O'NEILL; HERBERT LINCOLN O'NEILL; BARBARA D. ORCUTT; LAWRENCE E. ORCUTT; BERNICE JEAN ROUBIDOUX; DARLENE MARIE ROUBIDOX; PEGGY JOYCE SANDERSON; JOHN DENTON SIMPSON, II; VIVIAN KAY SIMPSON; ALBERTA SYLVIA; MARIA EILEEN TRIPP; GEORGIANA TRULL; LENA CLEVELAND WILDER; and THE COAST INDIAN COMMUNITY OF YUROK INDIANS OF THE RESIGHINI RANCHERIA, a federally recognized tribe,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS; MANUEL LUJAN, Secretary of the Interior; EDDIE BROWN, Assistant Secretary of the Interior/Indian Affairs; RONALD M. JAEGER, Area Director, Sacramento Area Office, Bureau of Indian Affairs; and KAROLE OVERBERG, Superintendant, Northern California Agency, Bureau of Indian Affairs,

Defendants - Appellees,

DALE RISLING, SR.; ROBERT D. HOSTLER; CLIFFORD LYLE MARSHALL; and JOHN M. SCOTT,

Intervenor Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
April 15, 1992 - San Francisco, California

Filed December 24, 1992

Before: Betty B. Fletcher, Cecil F. Poole and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Poole

OPINION

POOLE, Circuit Judge:

I.

Seventy individual Native Americans and the Coast Indian Community of Yurok Indians of the Resighini Rancheria, appellants, seek review of the district court's dismissal of their suit seeking injunctive relief and a declaration that the Hoopa-Yurok Settlement Act violates their constitutional rights. They also appeal the denial of their motion to amend their complaint. We affirm.

II.

On October 31, 1988, Congress enacted the Hoopa-Yurok Settlement Act, Pub.L.No. 100-580, 102 Stat. 2924 (codified at 25 U.S.C. §§ 1300i-1300i-11 (1988)) ("Act"), thereby partitioning a communal reservation on the Klamath and Trinity Rivers in Northern California for the purpose of "resolv[ing] long standing [sic] litigation between the United States, the Hoopa Valley Tribe and a large number of individual Indians." S.Rep.No. 564, 100th cong., 2d Sess. 1 (September 30, 1988). This litigation's provenience is found in the irruption of white settlers into California following the discovery of gold in 1849, which occasioned attempts by the federal government to "secure the cession by the Indians of their lands," *id.* at 4, and to immure "the many small tribes of bands of Indians" within a few "small tracts of land." *Id.* at 2-4.

Towards this end, Congress authorized the President in 1853 "to make five military reservations from the public domain in the State of California or the Territories of Utah and

New Mexico bordering on said State, for Indian purposes . . . *Provided,* That such reservations shall not contain more than twenty-five thousand acres." Act of march 3, 1853, ch. 104, 10 Stat. 226, 238.[1] Pursuant to this authorization, by Executive Order dated November 16, 1855, President Franklin Pierce established the 25,000 acre Klamath River Reservation, "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River." 1 Charles J. Kappler, *Indian Affairs, Laws & Treaties* 817 (2d ed. 1904). Most of the inhabitants of this area "were and have been Yurok Indians, also known as Klamaths." *Short v. United States,* 486 F.2d 561, 562 (Ct. Cl. 1973), *cert. denied,* 416 U.S. 961 (1974). The reservation was not entirely successful, however, as "the Hoopa and other inland tribes refused to move onto this reservation and armed conflict . . . continued." S. Rep. No. 564, at 4.

Thus Congress, in 1864, passed "An Act to provide for the Better Organization of Indian Affairs in California." Act of April 8, 1864, ch. 48, 13 Stat. 39. This measure empowered the President to:

> set apart . . . at his discretion, not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable . . .

Id. at 40. Acting under this authorization, President Ulysses S. Grant issued an executive order on June 23, 1876, formally establishing the Hoopa Valley Reservation, "a 12-mile square tract of land in Northern California, on the last reach of the Trinity River before it joins the Klamath River . . ." *Short,* 486 F.2d at 562; see 1 Kappler at 815. Most of the Indians residing in "the Square," as the Hoopa Valley Reservation has been called, "were and have been Hoopa Indians." *Short,* 486 F.2d at 562.

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[1]The Act was subsequently amended to provide for two additional reservations. Act of March 3, 1855, ch. 204, 10 Stat. 686, 699.

Since the Act of 1864 superseded the Act of 1853 by allowing only four reservations in California, and since the Klamath River Reservation was not one of the authorized reservations, the Klamath River Reservation was held to be abandoned as a reservation. *United States v. Forty-Eight Pounds of Rising Star Tea, Etc.*, 35 Fed. 403, 406 (N.D. Cal. 1888). President Benjamin Harrison, in response to this holding, issued an Executive Order on October 16, 1891, which expanded the Hoopa Valley Reservation by adding "a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the Said Hoopa Valley reservation to the Pacific Ocean." 1 Kappler at 815. This "Addition" or "Extension" thus extended the Hoopa Valley Reservation for some forty-five miles along the Klamath River, thereby encompassing the old Klamath River Reservation. The consequence of President Harrison's order "was the creation of an enlarged, single reservation incorporating without distinction its added and original tracts upon which the Indians populating the newly-added lands should reside on an equal footing with the Indians theretofore resident upon it." *Short,* 486 F.2d at 567.

Despite this, it has been an inveterate practice of the Department of the Interior and the Bureau of Indian Affairs (BIA), appellees in this case, to treat the Square and the Addition "as two separate reservations and the Yurok or Klamath Indians and the Hoopa Indians . . . as two separate tribes." S. Rep. No. 564, at 7. This treatment included the practice of allocating all revenues from the sale of timber grown on the Square to members of the Hoopa Valley Tribe. The "long standing [sic] litigation" which the Hoopa-Yurok Settlement Act sought to resolve has, in large part, been generated by Indians of the Addition seeking to recoup their share of profits from the previously unapportioned reservation. *See Short,* 486 F.2d 561. As a result of the first *Short* case, the federal government began an escrow fund by "sequestering 70 percent of the annual timber income pending the final decision in [that] case." *Short v. United States,* 661, F.2d 150, 156 (Ct. Cl. 1981), *cert. denied,* 455 U.S. 1034 (1982). The establishment of this trust account, in turn, led to more litigation, this time brought by the Hoopa Valley Tribe challenging the government's taking

of the timber revenues. *Hoopa Valley Tribe v. United States,* 596 F.2d 435 (Ct. Cl. 1979). Suite was also brought challenging the right of the Hoopa Valley Tribe to govern the whole reservation. *Puzz v. United States,* No. C-80-2908-TEH, 1990 U.S. Dist. LEXIS 4433 (N.D. Cal. April 8, 1990).

In the Hoopa-Yurok Settlement Act, Congress sought to resolve the legal conflicts by: (1) partitioning the reservation into two reservations, designating the Square as the "Hoopa Valley Reservation" and the Extension as the "Yurok Reservation," 25 U.S.C. § 1300i-1; (2) distributing the escrow funds, 25 U.S.C.§ 1300i-3; (3) confirming the status of the Hoopa Valley Reservation as the reservation to be held in trust for the Hoopa Valley Tribe, 25 U.S.C. § 1300i-1(b) & 7; (4) recognizing and organizing the Yurok Tribe, and designating the Addition or Yurok Reservation as the reservation to be held in trust for the Yurok Tribe, 25 U.S.C. § 1300i-1(c) & 8.

III.

The appellants brought suit against the United States, the Department of the Interior, and the BIA in August 1990, challenging the constitutionality of the Act on a variety of grounds. Appellants assert that, by extinguishing their interest in the Square and conferring exclusive right to the Square on the Hoopa Valley Tribe, the Act effects a taking of property for a non-public purpose and without just compensation in violation of the Fifth Amendment. They also allege a violation of their First Amendment right of freedom of association in that the Act allegedly forces Native Americans of diverse tribal affiliations to associate in a single, politically determined tribe in order to retain their interests and rights in the reservation. See 25 U.S.C. § 1300i-5(d)(3). Appellants also contend that Congress exceeded its constitutional authority to govern the Indian Tribes by dictating tribal membership, forms of tribal government, and means of tribal organization, and by interfering with the sovereignty of the Coast Indian Community of the Resighini Rancheria. Finally, appellants charge that the Act derogates their Fifth Amendment right to equal protection of the law by illegitimately preferring members of the Hoopa Valley Tribe over other Indians of the reservation.

Appellants sought declaratory relief, asking the court to declare the statute unconstitutional, to declare that the BIA's implementation of the statute is not in accordance with law in light of the unconstitutionality of the statute, and to construe the consequences under the Act if the appellants were to file a Fifth Amendment claim for compensation. Appellants also sought to enjoin the BIA from implementing the Act, from treating the reservation as other than a single, unified reservation, and from pursing policies favoring the Hoopa Valley Tribe. Finally, the appellants asked the court to require the BIA to take affirmative steps to protect their rights in the joint reservation and its revenues, and to foster self-government and self-determination.

In November 1990, four members of the Hoopa Valley Tribal Council filed an answer in intervention and counterclaimed for slander.[2] The intervenors also raised affirmative defenses, claiming that the complaint failed to state a claim for relief, that the Court lacked subject matter jurisdiction, and that the claims were fatally defective for failure to join the Hoopa Valley Tribe. The United States separately moved for dismissal in December 1990, on the grounds that the Hoopa Valley and Yurok tribes were indispensable parties, and that the Claims Court had exclusive jurisdiction. On May 23, 1991, the district court dismissed the action with prejudice pursuant to Fed.R.Civ.P. 19(b), ruling that the absent Hoopa Valley and Yurok tribes were indeed indispensable parties and immune from suit. On June 27, 1991, in an attempt to circumvent the Hoopa Valley Tribe's sovereign immunity, appellants sought to file a second amended complaint which named as defendants the individual members of the governing council of the Hoopa Valley Tribe. The court denied this motion.

IV.

We review for an abuse of discretion the district court's decision to dismiss the action. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991). Our analysis under Fed. R. Civ. P. 19 proceeds in two steps. We first ask whether the

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[2]The counterclaim was later voluntarily dismissed.

district court correctly determined that an absent party is "necessary" to the suit. Fed. R. Civ. P. 19(a). If so, and if that party cannot be joined, we than must assess whether the district court correctly found the party " 'indispensable' so that in 'equity and good conscience' the suit should be dismissed," *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990) (quoting Fed. R. Civ. P. 19(b)). "The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application. The moving party has the burden of persuasion in arguing for dismissal." *Id.* (citations omitted).

A.

[1] In determining whether a party is "necessary" under Rule 19(a), a court must consider whether "complete relief" can be accorded among the existing parties, and whether the absent party has a "legally protected interest" in the subject of the suit. *Id.* The district court found that complete relief could be granted, reasoning that if the act were found by the court to be unconstitutional, the appellants would receive "all the relief for which they prayed." This finding is not contested by any of the parties on appeal.

[2] The court also found, however, that the absent Hoopa and Yurok tribes had a "legally protected interest in the outcome of this action." Thus, under Rule 19, the absent tribes would be necessary to the action if "the disposition of the action in the [tribes'] absence may as a practical matter impair or impede the [tribes'] ability to protect that interest." Fed. R. Civ. P. 19(a)(2)(i).

Appellants challenge the district court's ruling on the grounds that the very existence of the absent tribes' interest depends on the legality of the Act. The appellants' position is not without some logical appeal. The Act is either constitutional or unconstitutional; if the latter, then the absent tribes nave no "legally protected interest in the outcome of the action"; if the former, then the appellants will not prevail and thus the disposition of the action will not impair the absent tribes' interests.

[3] The language of Rule 19, however, forecloses such an analysis. Under that rule, the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest: "A person . . . shall be joined as a party in the action if . . . the person claims an interest relating to the subject of the action . . ." Fed. R. Civ. P. 19(a)(2). Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party.

[4] Thus, the joinder rule is to be applied so as to preserve the right of parties "to make known their interests and legal theories." *Wichita and Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 775 (D.C. Cir. 1986). In this case, the absent tribes have an interest in preserving their own sovereign immunity, with its concomitant "right not to have [their] legal duties judicially determined without consent." *Enterprise Mgt. Consultants v. U.S. ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir. 1989). The district court was therefore correct in concluding that the tribes were necessary parties.

[5] We do not hold, of course, that a district court would be required to find a party necessary based on patently frivolous claims made by that party. But such is clearly not the case before us; the absent tribes have an indisputable interest in the outcome of appellants' suit, and the Act, which has created that interest, is not so palpably unconstitutional that we could readily say the absent tribes' claims are fatuous. *See, e.g., Confederated Tribes,* 928 F.2d at 1498 (protecting tribe's "current status as the exclusive governing authority of the reservation").

[6] Appellants argue in the alternative that the United States and the intervenors would be capable of adequately representing the interests of the absent tribes. As we noted in *Makah:*

> If a legally protected interest exists, the court must further determine whether that interest will be impaired or impeded by the suit. Impairment may be minimized if the absent party is adequately rep-

> resented in the suit. The United States may adequately represent an Indian tribe unless there is a conflict of interest between the United States and the tribe.

910 F.2d at 558. The district court correctly found, however, that this case presents a potential conflict of interest for the United States. While the United States might share the same ultimate goal as the absent tribes, namely that of vindicating the constitutionality of the Act, it is unlikely that the government could sufficiently represent the competing interests and divergent concerns of the tribes, for the government must also act in keeping with its role and obligations as trustee. As was the case in *Confederated Tribes,* "the United States cannot adequately represent the [absent tribes'] interest without compromising the trust obligations owed to the plaintiff tribes." 928 F.2d at 1500.

[7] Nor are the intervenor members of the Hoopa Valley Tribal Council capable of adequately representing the interests of the absent tribes. In assessing an absent party's necessity under Fed. R. Civ. P. 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed. R. Civ. P. 24(a). Consequently, we will consider three factors in determining whether existing parties adequately represent the interests of the absent tribes: whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments; whether the party is "capable of and willing to make such arguments"; and whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect. *County of Fresno v. Andrus,* 622 F.2d 436, 439 (9th Cir. 1980).

[8] We do not believe that the district court erred in finding that the absent tribes were not adequately represented by the parties before it. We note initially that, even if the intervenors were capable of representing the Hoopa Valley Tribe, there is no credible claim that they could sufficiently represent the interest of the absent Yurok tribe. In addition, the Act affects

the rights of the intervenors as individuals, in addition to benefiting the tribe to which they belong and which appellants would have them represent. Given this potential conflict, we cannot with any certainty conclude that the intervenors would be willing to make all of the arguments of the absent tribe.

Consequently, the district court did not abuse its discretion in concluding that the absent tribes were necessary to the adjudication of this case.

B.

[9] The absent tribes, while necessary, cannot be joined due to their sovereign immunity. Thus, we next review the district court's conclusion that the tribes were "indispensable," necessitating dismissal of the complaint under Rule 19(b). This rule requires our analysis to consider four factors:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *see Makah,* 910 F.2d at 560. The district court noted that the third and fourth factors favored a finding that the absent tribes were not indispensable, since the court had the power to grant the relief sought by the appellants even in the absence of the other tribes, and because dismissal of the action would leave the appellants without a forum in which to present several of their claims. The court concluded, however, that the first and second factors, which heavily favored a finding of indispensability, outweighed the third and fourth factors, and consequently dismissed the action. We agree with the district court's analysis, as well as the conclusion that the absent tribes could suffer severe prejudice should the appellants' claim succeed.

[10] Appellants argue that despite the potential for prejudice to the absent tribes, the action should be permitted to proceed under the "public riths" exception to the traditional joinder rules. *See* 3A James William Moore, *Moore's Federal Practice* ¶ 19.07, at 19-100-101, 133-137 (2d ed. 1991) ("in actions involving public rights, for example, the fact that a third party may be adversely affected by the litigation in insufficient in itself to justify treating him as an indispensable party"). In *Makah,* 910 F.2d at 559 n.6, we suggested that the public rights exception to joinder rules might be applicable when an absent tribe is necessary to adjudication of claims. In this case we agree with the appellants that some of the interests they seek to vindicate, like the interest in being governed by constitutional laws, are public rights. *Cf. Makah,* 910 F.2d at 559 ("[A]ll of the tribes have an equal interest in an administrative process that is lawful."). But, the public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the "adjudication[ ] do[es] not destroy the legal entitlements of the absent parties." *Connor v. Burford,* 848 F.2d 1441, 1459 (9th Cir. 1988) (citing *National Licorice Co. v. NLRB,* 309 U.S. 350, 366 (1940)), *cert. denied,* 489 U.S. 1012 (1989). Because of the threat to the absent tribes' legal entitlements, and indeed to their sovereignty, posed by the present litigation, application of the public rights exception to the joinder rules would be inappropriate.

V.

We review for an abuse of discretion the district court's denial of leave to amend after responsive pleadings have been filed. *Roth v. Garcia Marquez,* 942 F.2d 617, 628 (9th Cir. 1991). The denial is, however, " 'strictly' reviewed in light of the strong policy permitting amendment." *Texaco, Inc. v. Posnoldt,* 939 F.2d 794, 798 (9th Cir. 1991)(quoting *Moore v. Kayport Package Express,* 885 F.2d 531, 537 (9th Cir. 1989).

[11] Following the dismissal of their complaint, appellants sought leave of the court to file an amended complaint joining all officers of the Hoopa Valley Tribal Council as defendants. The district court denied the appellants' motion, finding that

"there was no possibility of stating a cause of action taking away something over which the tribes have sovereign immunity." If this finding was correct, the dismissal would not be an abuse of discretion, for "[a] district court does not err in denying leave to amend where the amendment would be futile." *DeSoto v. Yellow Freight Systems, Inc.*, 957 F.2d 655, 685 (9th Cir. 1992).

[12] Appellants premise their amended complaint on our holding in *Burlington Northern v. Blackfeet Tribe,* 924 F.2d 899 (9th Cir. 1991), *cert. denied,* _____U.S._____, 112 S. Ct. 3013 (1992), which observed that:

> sovereign immunity does not extend to officials acting pursuant to an allegedly unconstitutional statute . . . [T]ribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law.

924 F.2d 901. Despite the broad dicta of *Burlington Northern,* we do not agree that an officer's suit could be maintained under the circumstances of this case. Although the amended complaint names individual tribal council members ad defendants, it is clear from "the essential nature and effect" of the relief sought that the tribe "is the real, substantial party in interest." *Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459, 464 (1945). The Supreme Court has instructed that:

> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land v. Dollar,* 330 U.S. 731, 738 (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 704 (1949).

Dugan v. Rank, 372 U.S. 609, 620 (1963). The real party in interest in the amended complaint is therefore the sovereign tribe; indeed, were it not so, the amended complaint would not remedy the lack of adequate representation which necessitated dismissal of the complaint in the first place. It is true that officer's suits have been permitted in the past when "the stat-

ute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional."[3] *Larson,* 337 U.S. at 690. But, at the same time:

> a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Id. at 691 n.11. As we explained in *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir. 1969), this means that:

> the purposes for the doctrine of sovereign immunity may be controlling in some suits against officers so that the suits must be dismissed as suits against the Government even thought the officers were not acting pursuant to valid statutory authority, because the relief sought would work an intolerable burden on governmental functions, outweighing any consideration of private harm. In such cases a party must be denied all judicial relief other than that available in a possible action for damages.

Id. at 1318. The relief sought in this case would prevent the absent tribes from exercising sovereignty over the reservations allotted to them by Congress. It is difficult to imagine a more "intolerable burden on governmental functions." We conclude that the relief sought by the proposed amended complaint would have impermissibly infringed upon the sovereign immunity of the absent tribes. As a result, the amended complaint could not have eliminated the necessity of securing the presence of the absent tribes, and the district court thus committed no error in dismissing the case.

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[3]We assume, without deciding, that the unconstitutional acts alleged by appellants would suffice to state a claim against the officers of an Indian tribe. *But see Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1977) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

We realize that our decision effectively denies appellants a forum in which to have some of their grievances heard. This case serves as one more illustration, however, that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 72 (1978). Appellants' relief, if any is available, must be sought in the forum envisioned by Congress - namely, the Court of Claims. *See* 25 U.S.C. § 1300i-11.

The orders of the district court dismissing the complaint and denying leave to amend the complaint are AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ENTERED IN CIVIL DOCKET MAY 24, 1991

LILLIAN MCCOVEY SHERMOEN et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

and

DALE RISLING, SR., ET AL.,
Intervenor-Defendants.

No. C-90-2460 WHO
MEMORANDUM OPINION AND ORDER

In this action, plaintiffs, some seventy native American Indians and The Coast Indian Community of Yurok Indians of Resighini Rancheria, a federally recognized tribe, seek a judicial declaration that the Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i-1300i-11, unconstitutionally infringes their rights to freely associate in matters of political concern, violates their rights under the Due Process, Takings and Equal Protection clauses of the Fifth Amendment to the Constitution of the United States, and exceeds the power granted to Congress by the Constitution to regulate matters concerning Indian affairs. Defendants[1] and intervenor defendants, Dale Risling, Sr., Clifford Lyle Marshall, Robert D. Hostler, and

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[1]Defendants are the United States of America and the United States Department of Interior, Bureau of Indian Affairs, and in their official capacities, Manuel Lujan, Secretary of the Interior, Eddie Brown, Assistant Secretary of the Interior/Indian Affairs; Ronald M. Jaeger, Area Director, Sacramento Area Office, Bureau of Indian Affairs; and Karole Overberg, Superintendent, Northern California Agency, Bureau of Indian Affairs.

John M. Scott (collectively "defendants"), have moved the Court pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure to dismiss the action for failure to join indispensable parties under Rule 19 of the Federal Rules of Civil Procedure.[2]

The Court, having considered the pleadings and oral argument of counsel, hereby grants, for the reasons discussed below, defendants' motion and dismissed this action with prejudice.

I.

On October 31, 1988, Congress enacted the Hoopa-Yurok Settlement Act (the "Act") in an attempt to settle decades of bitter and protracted litigation involving the efforts of various individuals and tribes to gain control over the Hoopa Valley Reservation ("Hoopa Valley"), a federally created reservation along the banks of the Trinity and Klamath Rivers. Congress passed the Act only after extensive hearings and committee meetings at which members of all affected tribes participated. In fact, plaintiffs' lawyer participated in, and testified during, the hearings.

By the terms of the Act, Congress ratified and confirmed the Hoopa Valley Tribe as federally recognized and organized, 25 U.S.C. § 1300i-7, and affirmed the Karuk Tribe as federally recognized and organized. § 1300i (b)(7). The Act also recognizes and authorized the Yurok Tribe, which previously had been recognized but not organized. § 1300i-8. The Act also partitions the existing Hoopa Valley Reservation into the Hoopa Valley Reservation and the Yurok Reservation. § 1300i-1. Finally, the Act creates the Hoopa-Yurok Settlement Roll under which those individuals who qualify for inclusion on the Roll will receive compensation for past grievances. §§ 1300i-3,4.

II.

Defendants argue that both the Hoopa Valley Tribe and the

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[2]Defendants also have moved the Court to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. But given the Court's finding that the action must be dismissed for failure to join indispensable parties, the Court need not address defendants' 12(b)(1) and 12(b)(6) motions.

Yurok Tribe are necessary to an adjudication of this action under Rule 19 of the Federal Rules of Civil Procedure. They then argue that because Indian tribes are immune from suit under the doctrine of sovereign immunity, the action must be dismissed. The Court agrees.

Rule 19(a) of the Federal Rules of Civil Procedure provides in relevant part that a person should be joined as a party to an action if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

In determining whether absent parties are necessary to an action under 19(a), the Court must undertake a two-part analysis and test. *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990). In the first part of the test, the Court must determine whether it can grant complete relief to those already parties to the action. Second, the Court must determine whether the absent tribes have legally protected interests in the suit. If the Court finds that the absent parties do have legally protected interests in the action, it must then determine whether those interests will be impaired if the suit proceeds without them being joined. Applying this test to the facts of the instant case, the Court finds that the absent parties are necessary under Rule 19(a).

A.

In the first prong of the test, namely, whether complete relief is possible among those already parties, defendants claim complete relief cannot be given because all dispensable parties are not before the Court. But notwithstanding which parties are or are not before the Court, the Court is able to grant the requested relief. Either the Act is constitutional or it

is not. If the Court finds that the Act is unconstitutional, plaintiffs will have received all the relief for which they prayed. If the Court finds the Act constitutional, then the defendants, as well as the absent parties, who would presumably argue for the Act's constitutionality, would receive all the relief for which they prayed. The presence or absence of any other parties in no way limits the Court's ability to determine the constitutionality of the Act. This is not to say, however, that a finding that the Act is unconstitutional would not adversely affect those not present. It would. But the harm suffered by absent parties is properly analyzed under the second prong of the test and in no way alters the finding that the Court can grant complete relief among those already present.

B.

In the second prong of the test, the Court must determine whether the absent parties have legally protected interests in the outcome of this action.

Plaintiffs argue that the absent parties lack a legally protected interest in this litigation because " '[i]n litigation involving the adjudication of public rights, non-parties who may be adversely affected by a decision in plaintiffs' favor do not have a protectable [sic] interest which would require their joinder under Rule 19.' " Plaintiffs' Response to Defendants' Motions to Dismiss, filed Jan. 3, 1991, at 68 (quoting 3A J. Moore, J. Lucas, G. Grotheer, *Moore's Federal Practice* ¶ 19.07 [2-0] at 1001-101 (1990) (emphasis added). There are, however, two major problems with this argument. The first problem is that the public rights exception to traditional joinder rules is applicable in deciding whether a party is indispensable, not whether they have a legally protected interest. *Makah,* 910 F.2d at 559 n.6 ("Even if the absent tribes were 'necessary' to the Makahs' procedural claims, they would not be 'indispensable' "). It is only after a finding that a party has a legally protected interest in the litigation that a Court seeks to determine whether that party is indispensable to the action. *Id.* at 559.

The second problem with plaintiffs' public rights argument is that the rights plaintiffs seek to enforce are not "public

rights," but rather are personal to plaintiffs. As noted above, plaintiffs challenge the Act on the basis that it unconstitutionally infringes their rights to freely associate in matters of political concern and violates their rights under the Due Process, Takings and Equal Protection clauses of the Fifth Amendment to the Constitution of the United States. These clearly are not public rights. To the extent that plaintiffs challenge what they consider to be the unequal distribution of the Hoopa Valley's assets, they also cannot be said to be asserting public rights. As the court noted in *Makah,* where a plaintiff seeks reallocation of certain assets, the public rights exception to traditional rules of joinder has no efficacy. That having been said, the Court now turns to the determination of whether the absent tribes have legally protected interests in this litigation that might be impaired or impeded by their inability to be joined in this action.

There is no question that the Act creates certain legally protected interests in the absent parties. For example, the Act authorizes the creation of the Yurok Tribe. The Act then grants certain property rights to the newly formed Yurok Tribe, as well as to the existing Hoopa Valley Tribe.[3] It is equally clear that an order of this Court declaring the Act unconstitutional would adversely impact the rights granted to the absent parties by the Act. Thus, plaintiffs' protestations aside, there is no question that the absent parties do have legally protected interests in the outcome of this litigation. The Court next must determine whether these rights will be impaired or impeded by this litigation. *Makah,* 910 F.2d at 558. The Court finds that any such rights undoubtedly will be impaired by this litigation.

One important factor in determining whether an absent party's interest will be impaired is whether that party's interest is adequately represented by one already a party to the action. *Heckman v. United States,* 224 U.S. 413 (1912). As noted in *Makah,* "[t]he United States may adequately represent

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[3]Plaintiffs argue that the Hoopa Valley Tribe should be considered a party to this litigation because certain members of the Tribe are parties. But it is quite clear that the Hoopa Valley Tribe members who are present at appearing in their individual capacities and not as representatives of the tribe.

an Indian tribe unless there is a conflict between the United States and the tribe." 910 F.2d at 558. But the *Makah* court also noted that the federal government may not be able to protect the interest of absent tribes where the interests of those tribes conflict with the interests of tribes that are parties to the action. Just such a situation is present here.

Plaintiffs ask this Court to declare the Act unconstitutional. While the government arguably has as much interest in having the constitutionality of the Act upheld as do the absent parties, it nonetheless is true that the interests of the present and absent tribes are widely divergent. One of plaintiffs' primary complaints in this action is what they consider to be the grossly inequitable partition of the Hoopa Valley Reservation. Thus, a major goal that plaintiffs seek to achieve in this litigation is to have the reservation returned to the state it was in prior to the effective date of the Act. If successful, the effect will be a divestment of property rights that have inured to the benefit of the absent tribes. Thus, because the interests of the tribes conflict so greatly, the Court finds that the government cannot adequately represent the interests of the absent tribes.

The Court finds support for its position in two recent cases, *Wichita & Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765 (D.C. Cir. 1986), and *Kickapoo Tribe of Oklahoma v. Lujan,* 728 F. Supp. 791 (D.D.C. 1990). In *Wichita,* a number of tribes were litigating the rights to certain property held in trust for the tribes by the government. In holding that the action must be dismissed for failure to join indispensable parties, the court noted that "whatever allegiance the government owes to the tribes as trustee, is necessarily split among the three competing tribes involved in the case. This case, therefore, falls squarely under the rule that when 'there is a conflict between the interests of the United States and the interests of Indians, representation of the Indians by the United States is not adequate.' " 788 F.2d at 775 (quoting *Manygoats v. Kleppe,* 558 F.2d 556, 558 (10th Cir. 1977)).

Here, as in *Wichita,* the parties are fighting over a finite parcel of land that the government holds in trust for the Indians. Thus, there is nothing to lead this Court to believe that the government's allegiance in this action is any less split

among the various tribes than was the government's allegiance in *Wichita*.

Kickapoo also provides persuasive authority for the position that the defendants would have the Court adopt. In *Kickapoo*, an Indian tribe brought suit to enjoin the Secretary of the Interior from recognizing and dealing with a newly created independent tribe. Because of the sovereign immunity enjoyed by the challenged tribe, it was not joined in the action. The district court dismissed the action for failure to join the absent tribe finding that it was an indispensable party under Rule 19. In so finding, the court noted that it did not believe that the government could adequately represent the absent parties. While the court did recognize that the government has an interest in defending agency actions and authority with respect to tribal reorginazation, the court held that the absent tribe "has an interest in its own survival, an interest which it is entitled to protect on its own." 728 F.Supp. at 797. The United States Court of Appeals for the Ninth Circuit recently reached the same conclusion in a case with similar facts.

In *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), various groups of Indians brought suit against federal officials seeking to enjoin the government from recognizing and dealing with the Quinault Indian Nation (the "Nation") as the governing body of the Quinault Indian Reservation. Because of the sovereign immunity enjoyed by the Nation it was not named as a party to the action. The government then moved to dismiss the action, pursuant to Rule 19, for failure to join an indispensable party. The district court granted the motion finding that the Nation was indeed an indispensable party.

In affirming, the Ninth Circuit explicitly rejected the plaintiff tribes' argument that the government could adequately represent the absent Nation, holding that "the United States cannot adequately represent the Quinault Nation's interest without compromising the trust obligations owed to the plaintiff tribes." *Id.* at 1500.

The Court is persuaded by the analysis in *Confederated Tribes* and *Kickapoo* and finds that the Yurok Tribe, which the Act recognizes and authorizes to organize, similarly has an

overriding interest in its existence that the government cannot adequately represent without compromising the government's trust obligations to the other tribes. Therefore, the Court finds that the absent tribes have legally protected interests in the stake of this litigation that will be impaired in their absence and are, thus, necessary parties under Rule 19(a).

III.

Having so determined, the Court must now "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent [tribes] being thus regarded ad indispensable." Fed. R. Civ. P. 19(b). To determine whether the absent tribes are indispensable under Rule 19(b), the Rule instructs courts to consider four factors:

> first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. Applying these factors to the case at bar, the Court finds that the absent tribes are indeed indispensable.

A.

First, with respect to the prejudice the absent tribes will suffer from any adverse judgment, there can be do doubt that the absent tribes will be prejudiced severely if plaintiffs obtain the judgment they seek in this action. As noted above, plaintiffs seek to have the Act declared unconstitutional. Because the Act granted certain property rights in the Hoopa Valley to the absent tribes, any judgment invalidating the Act would necessarily have a deleterious effect on the absent tribes. As the court noted in *Wichita,* "[c]onflicting claims by beneficiaries to a common trust present a textbook example of a case where one party may be severely prejudiced by a

decision in his absence." *Wichita,* 788 F.2d at 774.

Nonetheless, plaintiffs argue that the fact that the absent tribes are free to intervene in this action acts to mitigate any prejudice the absent tribes might suffer. But this contention was expressly rejected by the courts in *Wichita,* 788 F.2d at 775, *Makah,* 910 F.2d at 560, and *Confederated Tribes,* 928 F.2d at 1500. The *Wichita* court noted that to hold to the contrary would "put the tribe[s] to th[e] Hobson's choice between waiving [their] immunity or waiving [their] right not to have a case proceed without [them]." *Wichita,* 788 F.2d at 776.

B.

Second, there is no way that the Court can shape relief so as to lessen or avoid the prejudice to the absent parties. Like the situations presented in both *Makah* and *Wichita,* the interest in the reservation land and resources over which the parties are fighting is of a finite quantity. Plaintiffs seek the return of lands that they contend are unconstitutionally taken by the terms of the Act. This is not a situation where plaintiffs merely seek monetary relief to compensate them for what they contend is an unconstitutional taking; rather, this is an equitable action in which plaintiffs seek to have the land itself returned. Any relief granted to them by the Court would necessarily involve taking away interests in the Hoopa Valley given to the absent tribes by the terms of the Act. Thus, there is no way to shape the relief to lessen or avoid prejudice to the absent tribes.

C.

The third factor the Court must consider under Rule 19(b), whether "a judgment rendered in the [tribes'] absence will be adequate," tips in favor of a finding that the absent tribes are not indispensable because the Court undoubtedly has the power to grant the relief requested by plaintiffs. Nonetheless, as the court in *Wichita* noted"[t]his factor, however, cannot be given dispositive weight when the efficacy of the judgment would be at the cost of absent parties' rights to participate in litigation that critically affect *[sic]* their interests." 788 F.2d at 777.

D.

The fourth and final factor the Court must consider is whether plaintiffs will have an adequate remedy if the action is dismissed. While it is true that dismissal of this action will leave plaintiffs without a forum in which to present a number of their claims,[4] this factor alone does not necessarily bar the Court from dismissing the action. As the court noted in Wichita, just because the plaintiff will not have an alternative forum elsewhere " 'does not mean that an action should proceed solely because the plaintiff otherwise would not have an adequate remedy, as this would be a misconstruction of the rule and would contravene the established doctrine of indispensability.' " *Id.* at 777 (quoting J. Moore, *supra,* ¶ 19.07-2[4] at 19-153 (1984)).

The court then noted that "when a necessary party is immune from suit, there is very little room for balancing of other factors, since this 'may be viewed as one of those interests "compelling by themselves." ' " *Id.* at 777 n. 13 (quoting J. Moore, *supra,* ¶ 19.15 at 19-266 n.6 (1984)). The ninth Circuit, too, has noted that the doctrine of sovereign immunity might very well lead to a situation where a plaintiff is left without a forum in which to bring his claims. *Makah* at 560, *Confederated Tribes,* 928 F.2d at 1500.

Based on the above analysis, the Court finds that the balance of the four factors just discussed tips sharply in favor of finding that the absent tribes are indispensable. Therefore, the Court has no alternative but to dismiss the action pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure.

This finding is consonant with both the Ninth Circuit's recent opinion in *Confederated Tribes* and a recent opinion from the Second Circuit, both of which affirmed decisions by district courts finding certain tribes indispensable in situations closely resembling the situation in the case at bar.

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[4]Defendants correctly point out that even if the Court dismisses this action, plaintiffs will still be able to bring an action in the Court of Claims for monetary relief for the allegedly unconstitutional taking of their property. In fact, the Act itself expressly provides for such an action. 25 U.S.C. § 1300i-11(a).

As discussed above, the court in *Confederated Tribes* upheld a district court's determination that a missing tribe was indispensable to the proper adjudication of an attempt to enjoin federal officials from recognizing and dealing with the missing tribe. In so doing, the court concluded that the district court had properly determined that the missing tribe was a party whose interests in the subject of the litigation might be impaired in their absence, and in whose absence the action should not proceed.

In *Fluent v. Salamanca Indian lease Authority,* 928 F.2d 542 (2d Cir. 1991), nearly six hundred lessees challenged the constitutionality of the Seneca Nation Settlement Act of 1990, by which Congress approved the renewal of a number of leases between the lessees and the Seneca Nation of Indians ("Nation") and appropriated $35 Million toward the rental payments. Because of the sovereign immunity enjoyed by the Nation, it was not joined in the action. Finding that resolution of the claims presented by the lessees would impair and impede the Nation's ability to protect its interests created by the Seneca Nation Settlement Act of 1990, the district court dismissed the action pursuant to Rules 19(b) and 12(b)(7) of the Federal Rules of Civil Procedure.

In affirming, the Second Circuit noted that "as the beneficiary of a substantial sum of money from the federal government it is manifest that the Nation has a vital interest in the constitutionality of the 1990 Act." 928 F.2d at 547. The court then held that the district court property concluded that the "paramount importance accorded the doctrine of sovereign immunity under rule 19" justified dismissing the action. Id. To reach that conclusion, the Second Circuit relied on the same cases that the Court discussed above, *Wichita* and *Makah*, as well as a Tenth Circuit case, *Enterprise Management Consultants, Inc. v. United States ex rel. Hodel,* 883 F.2d 890, 894 (10th Cir. 1989) ("[w]hen, as here, a necessary party under Rule 19(a) is immune from suit, 'there is very little room for balancing of other factors' set out in Rule 19(b) . . .") (quoting *Wichita,* 788 F.2d at 777 n.13).

IV.

For the foregoing reasons,

IT IS HEREBY ORDERED that defendants' motion to dismiss this action pursuant to Rules 19 and (12(b)(7) of the Federal Rules of Civil Procedure is hereby GRANTED, and the case dismissed with prejudice.

Dated: May 22, 1991.

William H. Orrick
United States District Judge

APPEARANCES:

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WEDNESDAY, JULY 10, 1991

THE CLERK: Calling Civil 90-2460, Lillian McCovey Shermoen, et al. versus the United States of America.

Counsel, come forward and state your appearances for the record.

MR GREGORY: John Gregory for the Federal defendants, your honor.

MR. SCHLOSSER; Tom Schlosser for the Hoopa defendants.

MR. THIEROLF: Richard Thierolf for the plaintiffs, your honor. Also with me is Curtis Burkey (Phonetic).

THE COURT: I went to great lengths studying your position. After I did that, I had the benefit of your oral argument. And after that, I wrote an opinion. And I worked very hard on the opinion and dismissed the case.

So the case is dismissed with prejudice. And I will tell you the reasons again why: each of the tribes are sovereign tribes. They have sovereign immunity, and they are indispensable parties under Federal Rule of Civil Procedure 19(a) in this action.

It's utterly foolish to think you can get around and cut out the sovereign immunity of the tribes by simply suing tribal officials. Normally, it's quite correct that under this kind of a motion it might be dismissed without prejudice.

But there is a very important exception to that, and the exception is that where there is no possibility of stating a cause of action taking away something over which the tribes have sovereign immunity, it is just a waste of time, not to say your clients' money, to go through the same exercise again. And I decline to do it, and I reaffirm my prior decision.

Now, there is a very good way to make an effort to get that decision changed, and that is to go the United States Court of Appeals for the Ninth Circuit. But as far as I am concerned, I have no problem with it in the slightest. The whole purpose of the lawsuit appears to be to invalidate the Hoopa-Yurok Settlement Act, and this just isn't the way to go about it.

Or perhaps you can go to the Congress. Sometimes you get more from the Congress. So the case has been, and is, and I now dismiss it with prejudice for the third time.

MR. THIEROLF: Your honor, then we will have to appeal, as you suggest.

THE COURT: Of course.

MR. THIEROLF: I understand there is a status conference scheduled today. So can we take this time to address some issues that are relevant to that?

THE COURT: There is no point to having the status conference since the case is dismissed. It's gone.

MR. THIEROLF: One thing I did today is I filed a motion for a temporary restraining order and order to show cause. That was filed about one-thirty today. I have given copies of it to the defendants.

I understand that the rule is that if you are going to seek such relief in the appellate court, you have to first seek it from the district court in conjunction with your filing of the notice of appeal.

THE COURT: The motion is denied. I don't have any problems about that, either.

MR. THIEROLF: So I can tell the Ninth Circuit that we tried?

THE COURT: Yes.

MR. THIEROLF: You will be entering judgment, I assume?

THE COURT: That is normally what follows after a dismissall. Plaintiffs prepare the order and the judgment. And in the meantime let me suggest to you that when you go to the court of appeals that you go prepared to discuss the case of Confederated Tribes against Lujan.

Have you read that case?

MR. THIEROLF: Very definitely, your honor.

THE COURT: It came down April 3rd. Then I don't have to cite it to you. Page 1499 deals with precisely the same question as to indispensable parties. That and the Burlington Northern case are the two main cases.

MR. THIEROLF: We relied on Burlington Northern for the argument that if the tribal officials are present in the case, in fact the tribe is represented and is not indispensable.

THE COURT: As you know, I dealt with that in my opinion and found that your view of that is different from mine and that it's opposite.

All right. Call the next case.

MR. THIEROLF: Your honor, could we have an immediate entry of judgment, like today or tomorrow, or something, so there is no question about the - -

THE COURT: Yes. Then you prepare the form of judgment. And take it up with Mr. Gregory and see that it's approved by him as to form. And lodge it in my chambers. And if I think it's proper, I will have no difficulty signing it.

MR. THIEROLF: Very well, your honor.

(Hearing concluded)

APPENDIX C

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extend a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non- joinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons when they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

§ 1300i. Short title and definition

(a) Short title. This Act may be cited as the "Hoopa-Yurok Settlement Act."

(b) Definitions. For the purpose of this Act, the term -

(1) "Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary of the accounts entitled -

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056"'

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001"

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, Tish-Tang-Atan, South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 2(b) of this Act [25 USC § 1300i-1(b)]:

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as

Hoopa Valley Reservation in section 2(b) and the Yurok Reservation in section 2(c) of this Act [25 USC § 1300i-1(b), (c)].

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 4 [25 USC § 1300i-3];

(10) "Settlement Roll" Means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 5 [25 USC § 1300i-4];

(11) "Short cases" means the cases entitled Jesse Short et al. v. United States, (Cl. Ct. No. 102-63); Charlene Ackley v. United States, (Cl. Ct. No. 460-78); Bret Aanstadt v. United States, (Cl. Ct. No. 146-85L); and Norman Giffen v. United States, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the Short cases;

(13) "Trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation:

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 2(c) of this Act [25 USC § 1300i-1(c)]; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 9 of this Act [25 USC § 1300i-8].

(Oct. 31, 1988, P.L. 100-580, § 102 Stat. 2924.)

§ 1300i-1. Reservations; partition and additions

(a) Partition of the joint reservation. (1) Effective with the publication in the Federal Register of the Hoopa tribal resolution as provided in paragraph (2), the joint reservation shall be partitioned as provided in subsections (b) and (c).

(2)(A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 8 [25 USC § 1300i-7], shall not become

effective unless, within 60 days after the date of the enactment of this Act [enacted Oct. 31, 1988], the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:

(i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and
(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.

(B) The Secretary, after determining the validity of the resolution transmitted pursuant to subparagraph (A), shall cause such resolution to be printed in the Federal Register.

(b) Hoopa Valley Reservations. Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(c) Yurok Reservation. (1) Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation. The unalloted trust land and assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.

(2) Subject to all valid existing rights and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 9(d)(2) [25 USC § 1300i-8(d)(2)], all right, title, and interest of the United States -

(A) to all national forest system lands within the Yurok Reservation , and

(B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1 E., Section 28, Lot 6: that

portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

(3)(A) Pursuant to the authority of sections 5 and 7 of the Indian Reorganization Act of June 18, 1934 (25 USC 465, 467), the Secretary may acquire from willing sellers lands or interests in land, including rights-of-way for access to trust lands, for the Yurok Tribe or its members, and such lands may be declared to be part of the Yurok Reservation.

(B) From amounts authorized to be appropriated by the Act of November 2, 1921 (42 Stat. 208; 25 USC 13), the Secretary shall use not less than $5,000,000 for the purpose of acquiring lands or interests in lands pursuant to subparagraph (A). No lands or interests in lands may be acquired outside the Yurok Reservation with such funds except lands adjacent to and contiguous with the Yurok Reservation or for purpose of exchange for lands within the reservation.

(4) The

(A) apportionment of funds to the Yurok Tribe as provided in sections 4 and 7 [25 USC §§ 1300i-3, 1300i-6];

(B) the land transfers pursuant to paragraph (2);

(C) the land acquisition authorities in paragraph (3); and

(D) the organizational authorities of section 9 shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may have against the United States arising out of the provisions of this Act.

(d) Boundary clarifications or corrections. (1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation, after the partition of the joint reservation as provided in this section, shall be the line established by the Bissel-Smith survey.

(e) Management of the Yurok Reservation. The Secretary shall be responsible for the management of the unallotted trust land and assets of the Yurok Reservation, until such time as the

Yurok Tribe has been organized pursuant to section 9 [25 USC § 1300i-8]. Thereafter, those lands and assets shall be administered as tribal trust land and the Yurok reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(f) Criminal and civil jurisdiction. The Hoopa Valley Reservation and Yurok Reservation shall be subject to section 1360 of title 28, United States Code; section 1162 of title 18, United States Code, and section 403(a) of the Act of April 11, 1968 (82 Stat. 79; 25 USC 1323(a)).

(Oct. 31, 1988, P.L. 100=580, § 2, 102 Stat. 2925.)

§ 1300i-2. Preservation of short cases

Nothing in this Act shall affect, in any manner, the entitlement established under decisions of the United States Claims Court in the Short cases or any final judgment which may be rendered in those cases.

(Oct. 31, 1988, P.L. 100-580, § 102 Stat. 2927)

§ 1300i-3. Hoopa-Yurok Settlement Fund

(a) Establishment (1) There is hereby, established the Hoopa-Yurok Settlement Fund. Upon enactment of this Act [enacted Oct. 31, 1988], the Secretary shall cause all the funds in the escrow funds, together with all accrued income thereon, to be deposited into the Settlement Fund.

(2) Until the distribution is made to the Hoopa Valley Tribe pursuant to section (c), the Secretary may distribute to the Hoopa Valley Tribe, pursuant to the provision of title I of the Department of the Interior and related Agencies Appropriations Act, 1985, under the heading "Bureau of Indian Affairs" and subheading "Tribal Trust Funds" at 98 Stat. 1849 (25 USC 123c), not to exceed $3,500,000 each fiscal year out of the income or principal of the Settlement Fund for tribal, non per capita purposes; Provided, however, That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall be deducted from the payment to the Hoopa Valley Tribe pursuant to subsection (c).

(3) Until the distribution is made to the Yurok Tribe

pursuant to section (d), the Secretary may, in addition to providing Federal funding, distribute to the Yurok Transition Team, pursuant to provision of title I of the Department of the Interior and Related Agencies Appropriation Act, 1985, under the heading "Bureau of Indian Affairs: and subheading "Tribal Trust Funds" at 98 Stat. 1849 (25 USC 123c), not to exceed $500,000 each fiscal year out of the income and principal of the Settlement Fund for tribal, non per capita purposes: Provided, however, That the Settlement Fund apportioned under subsections (c) and (d) shall be calculated without regard to this subparagraph, but any amounts distributed under this subparagraph shall be deducted from the payment to the Yurok Tribe pursuant to subsection (d).

(b) Distribution; investment. The Secretary shall make distribution from the Settlement Fund as provided in this Act and, pending payments under section 6 [25 USC § 1300i-5] and dissolution of the fund as provided in section 7 [25 USC § 1300i-6], shall invest and administer such fund as Indian trust funds pursuant to the first section of the Act of June 24, 1938 (52 Stat. 1037; 25 USC 162a).

(c) Hoopa Valley Tribe Portion. Effective with the publication of the option election date pursuant to section 6(a)(4) [25 USC § 1300i-5(a)(4)], the Secretary shall immediately pay out of the Settlement Fund into a trust account for the benefit of the Hoopa Valley Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of enrolled members of the Hoopa Valley Tribe as of the date of the promulgation of the Settlement Roll, including any persons enrolled pursuant to section 6 [25 USC § 1300i-5], by the sum of the number of such enrolled Hoopa Valley tribal members and the number of persons on the Settlement Roll.

(d) Yurok Tribe portion. Effective with the publication of the option election date pursuant to section 6(a)(4)]25 USC § 1300i-5(a)(4)], the Secretary shall pay out of the Settlement Fund into a trust account for the benefit of the Yurok Tribe a percentage of the Settlement Fund which shall be determined by dividing the number of persons on the Settlement Roll electing the Yurok Tribal Membership Option pursuant to section 6(c) [25 USC § 1300i-5(c)] by the sum of the number of

the enrolled Hoopa Valley tribal members established pursuant to subsection (c) and the number of persons on the Settlement Roll, less any amount paid out of the Settlement Fund pursuant to section 6(c)(3) [25 USC § 1300i-5(c)(3)].

(e) Federal share. There is hereby authorized to be appropriated the sum of $10,000,000 which shall be deposited into the Settlement Fund after the payments are made pursuant to subsections (c) and (d) and section 6(c). The Settlement Fund, including the amount deposited pursuant to this subsection and all income earned subsequent to the payments made pursuant to subsections (c) and (d) and section 69c), shall be available to make the payments authorized by section 6(d) [25 USC § 1300i-5(d)].

(Oct. 31, 1988, P.L. 100-580, § 4, 102 Stat. 2927.)

§ 1300i-4. Hoopa-Yurok settlement roll

(a) Preparation; eligibility criteria. (1) The Secretary shall pre-prepare a roll of all persons who can meet the criteria for eligibility as an Indian of the Reservation and-

(A) who were born on or prior to, and living upon, the date of enactment of this Act [enacted Oct. 31, 1988];

(B) who are citizens of the United States; and

(C) who were not, on August 8, 1988, enrolled members of the Hoopa Valley Tribe.

(2) The Secretary's determination of eligibility under this subsection shall be final except that any Short plaintiff determined by the United States Claims Court to be an Indian of the Reservation shall be included on the Settlement Roll if they meet the other requirements of this subsection and any Short plaintiff determined by the United States Claims Court not to be an Indian of the Reservation shall not be eligible for inclusion on such roll. Children under age 10 on the date they applied for the Settlement Roll who have lived all their lives on the Joint Reservation or the Hoopa Valley or Yurok Reservations, and who otherwise meet the requirements of this section except they lack 10 years of Reservation residence, shall be included on the Settlement Roll.

(b) Right to apply; notice. Within thirty days after the date of enactment of this Act [enacted Oct. 31, 1988], the Secretary

shall give such notice of the right to apply for enrollement as provided in subsection (a) as he deems reasonable except that such notice shall include, but shall not be limited to -

(1) actual notice by registered mail to every plaintiff in the Short cases at their last known address;

(2) notice to the attorneys for such plaintiffs; and

(3) publication in newspapers of general circulation in the vicinity of the Hoopa Valley Reservation and elsewhere in the State of California.

Contemporaneous with providing the notice required by this subsection, the Secretary shall publish such notice in the Federal Register.

(c) Application deadline. The deadline for application pursuant to this section shall be established at one hundred and twenty days after the publication of the notice by the Secretary in the Federal Register as required by subsection (b).

(d) Eligibility determination; final roll. (1) The Secretary shall make determinations of eligibility of applicants under this section and publish in the Federal Register the final Settlement Roll of such persons one hundred and eighty days after the date established pursuant to subsection (c).

(2) The Secretary shall develop such procedures and times as may be necessary for the consideration of appeals from applicants not included on the roll published pursuant to paragraph (1). Successful appellants shall be added to the Settlement Roll and shall be afforded the right to elect options as provided in section 6 [25 USC § 1300i-5], with any payments to be made to such successful appellants out of the remainder of the Settlement Fund after payments have been made pursuant to section 6(d) [25 USC § 1300i-5(d)] and prior to division pursuant to section 7 [25 USC § 1300i-6].

(3) Persons added to the Settlement Roll pursuant to appeals under this subsection shall not be considered in the calculations made pursuant to section 4 [25 USC § 1300i-3].

(4) For the sole purpose of preparing the Settlement Roll under this section, the Yurok Transition Team and the Hoopa Valley Business Council may review applications, make recommendations which the Secretary shall accept unless conflicting or erroneous, and may appeal the Secre-

retary's decisions concerning the Settlement Roll. Full diclosure of relevant records shall be made to the Team and to the Council notwithstanding any other provision of law.

(3) Effect of exclusion from roll. No person whose name is not included on the Settlement Roll shall have any interest in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Tribe, the Hoopa Valley Reservation, the Yurok Tribe, or the Yurok Reservation or in the Settlement Fund unless such person is subequently enrolled in the Hoopa Valley Tribe or the Yurok Tribe under the membership criteria and ordinances of such tribes.

(Oct. 31, 1988, P.L. 100-580, § 5, 102 Stat. 2928; May 24, 1990, P.L. 101-301, § 9(1), (2), 104 Stat. 210.)

§ 1300i-5. Election of settlement options.

(a) Notice of settlement options. (1) Within sixty days after the publication of the Settlement Roll as provided in section 5(d) [25 USC § 1300i-4(d)], the Secretary shall give notice by certified mail to each person eighteen years or older on such roll of their right to elect one of the settlement options provided in this section.

(2) The notice shall be provided in easily understood language, but shall be as comprehensive as possible and shall provide an objective assessment of the advantages and disadvantages of each of the options offered. The notice shall also provide information about the counseling services which will be made available to inform individuals about the respective rights and benefits associated with each option presented under this section. It shall also clarify that on election the Lump Sum Payment option requires the completion of a sworn affidavit certifying that the individual has been provided with complete information about the effects of such as election.

(3) With respect to minors on the Settlement Roll the notice shall state that minors shall be deemed to have elected the option of section 6(c) [subsec. (c) of this section], except that if the parent or guardian furnishes proof satisfactory to the Secretary that a minor is an enrolled member of a tribe that prohibits members from enrolling in other tribes, the parent or guardian shall make the election for such minor.

A minor subject to the provisions of section 6(c) [subsec. (c) of this section] shall, notwithstanding any other law, be deemed to be a child of a member of an Indian tribe regardless of the option elected pursuant to this Act by the minor's parent. With respect to minors on the Settlement Roll whose parent or guardian is not also on the roll, notice shall be given to the parent or guardian of such minor. The funds to which such minors are entitled shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such person including all interest accrued.

(4)(A) The notice shall also establish the date by which time the election of an option under this section must be made. The Secretary shall establish that date as the date which is one hundred and twenty days after the date of the publication in the Federal Register as required by section 5(d) [25 USC § 1300i-4(d)].

(B) Any person on the Settlement Roll who has not made an election by the date established pursuant to subparagraph (A) shall be deemed to have elected the option provided in subsection (c)>

(b) Hoopa tribal membership option. (1) Any person on the Settlement Roll, eighteen years or older, who can meet any of the enrollment criteria of the Hoopa Valley Tribe set out in the decision of the United States Court of Claims in its March 31, 1982, decision in the Short case (No. 102-63) as "Schedule A", "Schedule B", or "Schedule C" and who -

(A) maintained a residence on the Hoopa Valley Reservation on the date of enactment of this Act [enacted Oct. 31, 1988];

(B) had maintained a residence on the Hoopa Valley Reservation at any time within the five year period prior to the enactment of this Act [enacted Oct. 31, 1988]; or

(C) owns an interest in real property on the Hoopa Valley Reservation on the date of enactment of this Act [enacted Oct. 31, 1988],

may elect to be, and, upon such election, shall be entitled to be, enrolled as a full member of the Hoopa Valley Tribe.

(2) Notwithstanding any provision of the constitution, ordi-

nances or resolutions of the Hoopa Valley Tribe to the contrary, the Secretary shall cause any entitled person electing to be enrolled as a member of the Hoopa Valley Tribe to be so enrolled and such person shall thereafter be entitled to the same rights, benefits, and privileges as any other member of such tribe.

(3) The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Yurok Indian Reservation or the Yurok Tribe or in the Settlement Fund.

(c) **Yurok tribal membership options.** (1) Any person on the Settlement Roll may elect to become a member of the Yurok Tribe and shall be entitled to participate in the organization of such tribe as provided in section 9 [25 USC § 1300i-8].

(2) All persons making an election under this subsection shall form the base roll of the Yurok Tribe for purposes of organization pursuant to section 9 [25 USC § 1300i-8] and the Secretary shall determine the quantum of "Indian blood" if any pursuant to the criteria established in the March 31, 1982, decision of the United States Court of Claims in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63).

(3) The Secretary, subject to the provisions of section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended (25 USC 1407), shall pay to each person making an election under this subsection, $5,000 out of the Settlement Fund for those persons who are, on the date established pursuant to section 6(a)(4) [subsec. (a)(4) of this section], below the age of 50 years, and $7,500 out of the Settlement Fund for those persons who are, on that date, age 50 or older.

(4) Any person making an election under this subsection shall no longer have any right or interest whatsoever in the tribal, communal, or unallotted land, property, resources, or

rights within, or appertaining to, the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except to the extent authorized by paragraph (3), in the Settlement Fund. Any such person shall also be deemed to have granted to members of the Interim Council established under section 9 [25 USC § 1300i-8] an irrevocable proxy directing them to approve a proposed resolution waiving any claim the Yurok Tribe may have against the United States arising out of the provisions of this Act, and granting tribal consent as provided in section 9(d)(2) [25 USC § 1300i-8(d)(2)].

(d) Lump sum payment option. (1) Any person on the Settlement Roll may elect to receive a lump sum payment from the Settlement Fund and the Secretary shall pay to each such person the amount of $15,000 out of the Settlement Fund: Provided, That such individual completes a sworn affidavit certifying that he or she has been afforded the opportunity to participate in counseling which the Secretary, in consultation with the Hoopa Tribal Council or Yurok Transition Team, shall provide. Such counseling shall provide a comprehensive explanation of the effects of such election on the individual making such election, and on the tribal enrollment rights of that persons children and descendants who would otherwise be eligible for membership in either the Hoopa or Yurok Tribe.

(2) The option to elect a lump sum payment under this section is provided solely as a mechanism to resolve the complex litigation and other special circumstances of the Hoopa Valley Reservation and the tribes of the reservation, and shall not be construed or treated as a precedent for any future legislation.

(3) Any person making an election to receive, and having received, a lump sum payment under this subsection shall not thereafter have any interest or right whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to, the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or; except authorized by paragraph (1), in the Settlement Fund.

(Oct. 31, 1988, P.L. 100-580, § 6, 102 Stat. 2929.)

§ 1300i-6. Division of settlement fund remainder

(a) Any funds remaining in the Settlement Fund after the payments authorized to be made therefrom by subsections (c) and (d) of section 6 [25 USC § 1300i-5(c), (d)] and any payments made to successful appellants pursuant to section 5(d) [25 USC § 1300i-4(d)] shall be paid to the Yurok Tribe and shall be held by the Secretary in trust for such tribe.

(b) Funds divided pursuant to this section and any funds apportioned to the Hoopa Valley Tribe and the Yurok Tribe pursuant to subsections (c) and (d) of section 4 [25 USC § 1300i-3(c), (d)] shall not be distributed per capita to any individual before the date which is 10 years after the date on which the division is made under this section: Provided, however, That if the Hoopa Valley Business Council shall decide to do so it may distribute from the funds apportioned to it a per capita payment of $5,000 per member, pursuant to the Act of August 2, 1983 (25 USC 117a et seq.).

(Oct. 31, 1988, P.L. 100-580, § 7, 102 Stat. 2931.)

§ 1300i-7. Hoopa Valley Tribe; confirmation of status

The existing govening [governing] documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.

(Oct. 31, 1988, P.L. 100-580 § 8, Stat. 2932)

§ 1300i-8. Recognition and organization of the Yurok Tribe

(a) Yurok Tribe. (1) Those persons on the Settlement Roll who made a valid election pursuant to subsection (c) of section 6 [25 USC § 1300i-5(c)] shall constitute the base membership roll for the Yurok Tribe whose status as an Indian tribe, subject to the adoption of the Interim Council resolution as required by subsection (d)(2), is hereby ratified and confirmed.

(2) The Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 USC 461 et seq.), as amended, is hereby made applicable to the Yurok Tribe and the tribe may organize under such Act as provided in this section.

(3) Within thirty days (30) after the enactment of this Act [enacted Oct. 31, 1988] the Secretary, after consultation

with the appropriate committees of Congress, shall appoint five (5) individuals who shall comprise the Yurok Transition Team which, pursuant to a budget approved by the Secretary, shall provide counseling and assistance, shall promote communication with potential members of the Yurok Tribe concerning the provisions of this Act, and shall study and investigate programs, resources, and facilities for consideration by the Interim Council. The Yurok Transition Team may receive grants and enter into contracts for the purpose of carrying out his section and section 10(a) of this Act [25 USC § 1300i-9(a)]. Such grants and contracts shall be transferred to the Yurok Interim Council upon its organization. Any property acquired for or on behalf of the Yurok Transition Team shall be held in the name of the Yurok Tribe.

(b) Interim Council; establishment. There shall be established an Interim Council of the Yurok Tribe to be composed of five members. The Interim Council shall represent the Yurok Tribe in the implementation of provisions of this Act, including the organizational provisions of this section, and subject to subsection (d) shall be governing body of the tribe until such time as a tribal council is elected under a constitution adopted pursuant to subsection (e).

(c) General council; election of Interim Council. (1) Within 30 days after the date established pursuant to section 6(a)(4) [25 USC § 1300i-5(a)(4)], the Secretary shall prepare a list of all persons eighteen years of age or older who have elected the Yurok Tribal Membership Option pursuant to section 6(c) [25 USC § 1300i-5(c)], which persons shall constitute the eligible voters of the Yurok Tribe for the purposes of this section, and shall provide written notice to such persons of the date, time, purpose, and order of procedure for the general council meeting to be schedule pursuant to paragraph (2) for the consideration of the nomination of candidates for election to the Interim Council.

(2) Not earlier than 30 days before, nor later than 45 days after, the notice provided pursuant to paragraph (1), the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe on or near the Yurok Reservation, to be conducted under such order of procedures as

the Secretary determines appropriate, for the nomination of candidates for election of members of the Interim Council. No person shall be eligible for nomination who is not on the list prepared pursuant to this section.

(3) Within 45 days after the general council meeting held pursuant to paragraph (2), the Secretary shall hold an election by secret ballot, with absentee balloting and write-in voting to be permitted, to elect the five members of the Interim Council from among the nominations submitted to him from such general council meeting. The Secretary shall assure that notice of the time and place of such election shall be provided to eligible voters at least fifteen days before such election.

(4) The Secretary shall certify the results of such election and, as soon as possible, convene an organizational meeting of the newly-elected members of the Interim Council and shall provide such advice and assistance as may be necessary for such organization.

(d) **Interim Council; authorities and dissolution.** (1) The Interim Council shall have no powers other than those given to it by this Act.

(2) The Interim Council shall have full authority to adopt a resolution -

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act; and

(ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act, and

(iii) to receive grants from, and enter into contracts for, Federal programs, including those administered by the Secretary and the Secretary of Health and Human Services, with respect to Federal services and benefits for the tribe and its members.

(3) The Interim Council shall have such other powers, authorities, functions, and responsibilities as the Secretary may recognize, except that any contract or legal obligation that would bind the Yurok Tribe for a period in excess of two years from the date of the certification of the election by the Secretary shall be subject to disapproval and cancellation by the Secretary if the Secretary determines that such a contract or legal obligation is unnecessary to

improve housing conditions of members of the Yurok Tribe, or to obtain other rights, privileges or benefits that are in the long-term interest of the Yurok Tribe.

(4) The Interim Council shall appoint, as soon as practical, a drafting committee which shall be responsible, in consultation with the Interim Council, the Secretary and members of the tribe, for the preparation of a draft constitution for submission to the Secretary pursuant to subsection (e).

(5) The Interim Council shall be dissolved effective with the election and installation of the initial tribe governing body elected pursuant to the constitution adopted under subsection (e) or at the end of two years after such installation, whichever occurs first.

(e) Organization of Yurok Tribe. Upon written request of the Interim Council or the drafting committee and the submission of a draft constitution as provided in paragraph (4) of subsection (d), the Secretary shall conduct an election, pursuant to the provisions of the Indian Reorganization Act of June 18, 1934 (25 USC 461 et seq.) and rules and regulations promulgated thereunder, for the adoption of such constitution and, working with the Interim Council, the election of the initial tribal governing body upon the adoption of such constitutions.

(Oct 31, 1988, P.O. 100-580, § 9, 102 Stat. 2932; oct. 23, 1989, P.L. 101-121, Title III, § 315, 103 Stat. 744; May 24, 1990, P.L. 101-301, § 9(3), 104 Stat. 211.)

§ 1300i-9. Economic development

(a) Plan for economic self-sufficiency. The Secretary shall-

(1) enter into negotiations with the Yurok Transition Team and the Interim Council of the Yurok Tribe with respect to establishing a plan for economic development for the tribe; and

(2) in accordance with this section and not later than two years after the date of enactment of this Act [enacted Oct. 31, 1988], develop such a plan.

(3) upon the approval of such plan by the Interim Council or tribal governing body (and after consultation with the State and local officials pursuant to subsection (b) of this section), the Secretary shall submit such plan to the Congress.

the Secretary by any party named in paragraph (1).
(Oct. 31, 1988, P.L. 100-580, § 10, 102 Stat. 2934.)

§ 1300i-10. Special considerations

(a) Estate for Smokers family. The 20 acre assignment on the Hoopa Valley Reservation made by the Hoopa Area Field Office of the Bureau of Indian Affairs on August 25, 1947, to the Smokers family shall continue in effect and may pass by descent or devise to any blood relative or relative of one-fourth or more Indian blood of those family members domiciled on the assignment on the date of enactment of this Act [enacted Oct. 31, 1988].

(b) Rancheria merger with Yurok Tribe. If a majority of the adult members of any of the following Rancherias at Resighini, Trinidad, or Big Lagoon, vote to merge with the Yurok Tribe in an election which shall be conducted by the Secretary within ninety days after the date of enactment of this Act [enacted Oct. 31, 1988], the tribes and reservations of those rancherias so voting shall be extinguished and the lands and members of such reservations shall be part of the Yurok Reservation with the unallotted trust land therein held in trust by the United States for the Yurok Tribe: Provided, However, That the existing governing documents and the elected governing bodies of any rancherias voting to merge shall continue in effect until the election of the Interim Council pursuant to section 9 [25 USC § 1300i-8]. The Secretary shall publish in the Federal Register a notice of the effective date of the merger.

(c) Preservation of leasehold and assignment rights of Rancheria residents. Real property on any rancheria that merges with the Yurok Reservation pursuant to subsection (b) that is, on the date of enactment of this Act [enacted Oct. 31, 1988], held by any individual under a lease shall continue to be governed by the terms of the lease, and any land assignment existing on the date of the enactment of this Act [enacted Oct. 31, 1988], shall continue in effect and may pass by descent or devise to any blood relative or relatives of Indian blood of the assignee.
(Oct. 31, 198, P.L. 100-580, § 11, 102 Stat. 2935.)

§ 1300i-11. Limitations of actions; waiver of claims

(a) Any claim challenging the partition of the joint reservation pursuant to section 2 [25 USC § 1300i-1] or any other provision of this Act as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to 28 USC 1491 or 28 USC 1505, in the United States Claims Court. The Yurok Transition Team, or any individual thereon, shall not be named as a defendant or otherwise joined in any suit in which a claim is made arising out of this subsection:

(b)(1) Any such claim by any person or entity, other than the Hoopa Valley Tribe or the Yurok Tribe, shall be forever barred if not brought within the later of 210 days from the date of the partition of the joint reservation as provided in section 2 [25 USC § 1300i-i] or 120 days after the publication in the Federal Register of the option election date as required by section 6(a)(4) [25 USC § 1300i-5(a)(4)].

(2) Any such claim by the Hoopa Valley Tribe shall be barred 180 days after the date of enactment of this Act [enacted Oct. 31, 1988] or such earlier date as may be established by the adoption of a resolution waiving such claims pursuant to section 2(a)(2) [25 USC § 1300i-1(a)(2)].

(3) Any such claim by the Yurok Tribe shall be barred 180 days after the general council meeting of the Yurok Tribe as provided in section 9 [25 USC § 1300i-8] or such earlier date as may be established by the adoption of a resolution waiving such claims as provided in section 9(d)(s) [25 USC § 1300i-8(d)(2)].

(c)(1) The Secretary shall prepare and submit to the Congress a report describing the final decision in any claim brought pursuant to subsection (b) against the United States or its officers, agencies, or instrumentalities.

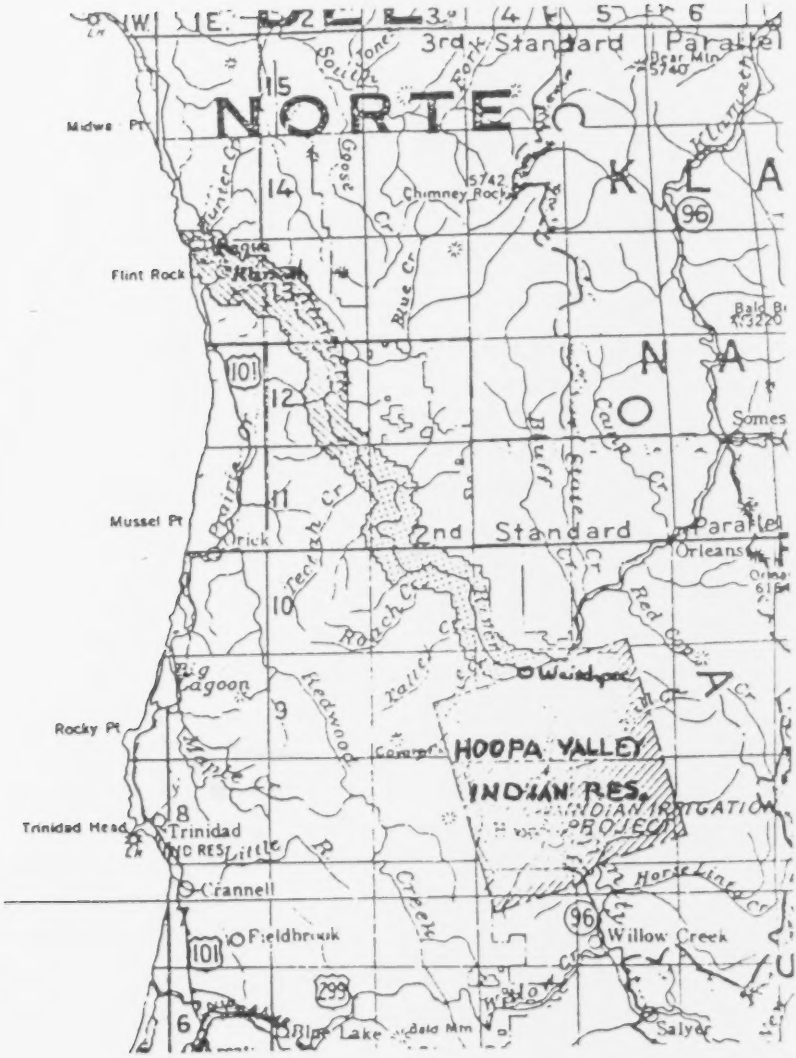
(2) Such report shall be submitted no later than180 days after the entry of final judgement in such litigation. The report shall include any recommendations of the Secretary for actin by Congress, including, but not limited to, any supplemental funding proposals necessary to implement the terms of this Act and any modifications to the resource and management authorities established by this Act. Notwithstanding the provisions of 28 USC 2517, any judg-

ment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

(Oct. 31, 1988, P.L. 100-580, § 14, 102 Stat. 2936; May 24, 1990, P.L. 101-301, § 9(4), 104 Stat. 211.)

APPENDIX E

Scale: 1 inch = 12 miles



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Supreme Court, U.S.
FILED
MAY 28 1993

No. 92-1541

IN THE

Supreme Court of the United States

October Term, 1992

LILLIAN McCOVEY SHERMOEN, *et al.*,
Petitioners.

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Could the district court decide the constitutionality of the Hoopa-Yurok Settlement Act of 1988 in a suit against the United States, when the Act requires that such challenges be filed in the United States Court of Federal Claims and when Indian tribes that obtained vested property rights and governmental authority by the Act were not also parties?

2. Does a public rights exception to usual rules of joinder under Fed. R. Civ. P. 19 permit a constitutional challenge by competing claimants under a federal statute to be decided in the absence of Indian tribes that obtained vested property rights and governmental authority under that statute?

3. Does Indian tribal sovereign immunity prevent a suit against tribal officials when only equitable relief is sought to void a statute's vesting of property rights and governmental authority in tribes, and when plaintiffs' claims are not causally connected to any action of a tribal official?

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No. 92-1541

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

LILLIAN McCOVEY SHERMOEN, *et al.*,
Petitioners.

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

Respondents Dale Risling, Sr., Robert D. Hostler, Clifford Lyle Marshall and John M. Scott oppose the requested writ of certiorari in this unique case. Petitioners' claims belong in, and will be resolved by, two actions pending in the United States Court of Federal Claims,[1] *Ammon v. United States*, No. 91-1432L, and *Yurok Indian*

[1] Pursuant to the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, the United States Claims Court was renamed the United States Court of Federal Claims. That court will be referred to as the "claims court" herein.

Tribe v. United States, No. 92-173L. *See* Petition ("Pet.") 6 n.4.[2/] Those actions will be reviewable later.

RULES, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fed. R. Civ. P. 19 (reproduced at petitioners' appendix C ("Pet. App.").

2. U.S. Const. art. I, § 8, cl. 3, and Amendments I and V. Pet. 2.

3. The Hoopa-Yurok Settlement Act, as amended, 25 U.S.C. §§ 407, 1300i *et seq.*, and 16 U.S.C. § 460ss-3. The portions of the Act codified at 25 U.S.C. §§ 1300i *et seq.* are reproduced in Pet. App. D. Petitioners omit the portions of the Act codified elsewhere; these are reproduced in Hoopa respondents' appendix A ("Resp. App."), *infra*.

STATEMENT

I. Nature of the Case. In northwestern California, 45 miles up the mighty Klamath River, the Trinity River enters the Klamath. There lies the Yurok/Hoopa reservation boundary, just at a point where the traditional territories, languages and cultures of several distinct Indian tribes intersect. This suit is about Congress' latest effort to settle the physical and political boundary at that point.

By executive order in 1855, President Pierce established the Klamath River Reservation along the lower

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[2/] These cases were recently consolidated as *Karuk Tribe of California v. The United States*, Fed. Cl. Nos. 90-3993L, 91-1432L and 92-173L, before the Honorable Lawrence S. Margolis, Judge, United States Court of Federal Claims.

twenty miles of the Klamath River. However, the Hoopas and other tribes refused to move to that reservation. In 1864, Congress authorized establishment of four reservations, one of which enclosed Hoopa Valley on the lower twelve miles of the Trinity River. Without the knowledge of the Indians, in 1891 by executive order, President Harrison joined the two tribal reservations, thereby also reserving a 25-mile strip of land in between. In 1958 the Interior Department defined the rights of the Indians of the joint reservation. 1 Ops. of the Solicitor 1814, 65 I.D. 59 (1958). The joinder of the Yurok and Hoopa reservations has been fiercely contested at every level of the federal court system since. The petition here seeks to continue the fight.

In 1963, Yurok Indians, later joined by nearly 4,000 plaintiffs, filed *Short v. United States*, Fed. Cl. No. 102-63, leading to a liability ruling, 202 Ct. Cl. 870, 486 F.2d 561 (1973), *cert. denied*, 416 U.S. 961 (1974), and hundreds of additional orders, opinions and lawsuits. Neither judges nor the Federal Mediation Service proved able to resolve the ancient feud over allocation and management of the Indian assets and benefits in the decades that followed. Significantly, in 1988, a federal district court concluded that the applicable 1864 Act of Congress did not delegate territorial management power to any Indian tribes. Congress filled the resulting void.

The Hoopa-Yurok Settlement Act of 1988 ("Settlement Act") was shaped through extensive congressional hearings, two each in the House and in the Senate, in which all sides (including several petitioners here and their counsel) fully participated.[3/] There was tremendous Yurok

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[3/] *See* Hearing Before the Comm. on Interior and Insular Affairs, House of Representatives, 100th Cong., 2d Sess., on H.R. 4469, Serial No. 100-75 (June 21, 1988); Hearing Before the Select Comm. on Indian

Indian as well as Hoopa Indian support for the legislation. Petitioners impugn Congress' motive, saying: "The Act's basic purpose was to benefit the Hoopa Valley Tribe with property and funds." Pet. 4. However, the Senate reported that: "The intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law." *Partitioning Certain Reservation Lands between the Hoopa Valley Tribe and the Yurok Indians [etc.]*, S. Rep. 100-564, 100th Cong., 2d Sess. at 2 (1988) (hereinafter "S. Rep. 100-564") (reproduced in respondents' Appendix B at 6a). The Settlement Act responds to the absence of clear property rights in any tribes or Indians, the judicially declared restrictions on federally recognized Indian tribes with respect to reservation management, and the continuing interference with organizational efforts of the Yurok Indian Tribe stemming from the still-pending *Short v. United States* claims litigation.

II. Course of Proceedings. On August 28, 1990, Lillian Shermoen and her fellow petitioners, who are also plaintiffs in *Short v. United States*, Fed. Cl. No. 102-63 (or their minor children),[4/] and the Coast Indian Community of the

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Affairs, U.S. Senate, 100th Cong., 2d Sess., on Oversight Hearing on Hoopa-Yurok Indian Reservation, S. Hrg. 100-946 (June 30, 1988); Hearing Before the Select Comm. on Indian Affairs, U.S. Senate, 100th Cong., 2d Sess., on S. 2723, S. Hrg. 100-949 (September 14, 1988); Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the Comm. on the Judiciary, House of Representatives, 100th Cong. 2d Sess., on H.R. 4469, Serial No. 100-77 (September 30, 1988).

[4/] In the district court *Shermoen* included 70 individual plaintiffs, 67 of whom are also plaintiffs in *Short v. United States*. The remaining three are children of *Short* plaintiffs. As discussed below, all but one *Shermoen* plaintiff qualified for and were included upon the Settlement Roll. *See* 56 Fed. Reg. 12062 (March 21, 1991). The non-qualified *Shermoen* plaintiff is *Short* plaintiff Carol Leigh Ammon. As noted, Pet. ii, three *Shermoen* plaintiffs are now deceased. Thus of 67 individual petitioners, 65 are *Short* plaintiffs and the remaining two are minor

Resighini Rancheria, filed suit to nullify the whole Settlement Act. CR #7 at 28.[5/] Without objection, four individual Hoopa tribal members ("Hoopa respondents") intervened to assert their individual claims.

The parties fully briefed the merits of Shermoen's complaint. On November 30, 1990, Hoopa respondents moved to dismiss the action under Fed. R. Civ. P. 12(b)(1), (6) and (7), arguing that exclusive subject matter jurisdiction was vested in the claims court by 25 U.S.C. § 1300i-11, that the complaint failed to state a claim upon which relief can be granted, and that the Hoopa Valley and Yurok Tribes were absent indispensable parties. Federal defendants sought dismissal on narrower grounds. At the district court's behest, all issues were thoroughly briefed and submitted on the merits.

On May 23, 1991, the district court dismissed all of plaintiffs' claims. Pet. App. 17a. The district court chose not to address the merits relying instead on failure to join indispensable parties who possessed sovereign immunity. Under Rule 19(a), the court determined that while it could grant complete relief to existing parties, the absent tribes had legally protected interests in the litigation. The court said:

> There is no question that the Act creates certain legally protected interests in the absent parties. For example, the Act authorizes the creation of the Yurok Tribe. The Act then grants certain property rights to the newly formed Yurok Tribe, as well as to the existing Hoopa Valley Tribe.[fn] It is

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children of *Short* plaintiffs.

[5/] "CR" record citations are to the district court's docket entries.

> equally clear that an order of this Court declaring the Act unconstitutional would adversely impact the rights granted to the absent parties by the Act. Thus, plaintiffs' protestations aside, there is no question that the absent parties do have legally protected interests in the outcome of this litigation. The Court next must determine whether these rights will be impaired or impeded by this litigation. *Makah* [*Indian Tribe v. Verity*], 910 F.2d [555,] at 558 [(9th Cir. 1990)]. The Court finds that any such rights undoubtedly will be impaired by this litigation.
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> [fn] Plaintiffs argue that the Hoopa Valley Tribe should be considered a party to this litigation because certain members of the Tribe are parties. But it is quite clear that the Hoopa Valley Tribe members who are present are appearing in their individual capacities and not as representatives of the tribe.

Pet. App. 21a.

The district court concluded that the absent tribes' interests could not be adequately represented by the United States, which has conflicting duties to a number of tribes. The court found that the Act granted certain property rights in the former joint reservation to absent tribes, stating:

> Plaintiffs seek the return of lands that they contend are unconstitutionally taken by the terms of the Act. This is not a situation where plaintiffs merely seek monetary relief

> to compensate them for what they contend is an unconstitutional taking; rather, this is an equitable action in which plaintiffs seek to have the land itself returned. Any relief granted to them by the Court would necessarily involve taking away interests in the Hoopa Valley given to the absent tribes by the terms of the Act.

Pet. App 25a. The court concluded that the absent tribes were indispensable to plaintiffs' suit to void the entire Settlement Act.

On June 12, 1991, plaintiffs moved to modify the court's dismissal on the ground that they could "correct the defect in parties and resume their attack on the Settlement Act by joining tribal officials as defendants." CR #92. Petitioners also moved for permission to file a second amended complaint that purported to add as defendants the Yurok Tribe, the Yurok Interim Council, the Hoopa Valley Business Council as a body, and all individual Hoopa Tribal Council members. Both motions were heard by the district court and denied on July 10, 1991. Pet. App. 29a.

On July 16, 1991, petitioners made an emergency motion under Ninth Circuit Rule 27-3 seeking an injunction barring implementation of the Settlement Act pending appeal. Specifically, petitioners sought to bar the Bureau of Indian Affairs from employing July 19, 1991 as the date for persons on the Settlement Roll to elect among the options of the Act, discussed below. The Court of Appeals denied the request. As a result, over 2,900 persons elected Yurok membership, and some 700 chose the lump sum payment option. Those persons received the payments accompanying their selected option and thereby waived claims arising under the Act. 25 U.S.C. § 1300i-5(c)(4); -5(d)(3). Pet. App. 44a. *See Heller, Ehrman, White &*

McAuliffe v. Babbitt, ___ F.2d ___, 1993 WL 158142, Nos. 92-5003 and 92-5004 (D.C. Cir. May 18, 1993).

On September 16, 1991, 32 plaintiffs, including 20 of the appellants here, filed an action in the claims court, *Ammon v. United States*, No. 91-1432L. *Ammon* seeks compensation for the Settlement Act's alleged taking of enumerated rights protected by the Fifth Amendment. Plaintiffs in *Ammon* act for themselves and on behalf of a group that includes each individual petitioner in this Court.

On September 14, 1991, the Bureau of Indian Affairs conducted the general council meeting of eligible voters of the Yurok Tribe, pursuant to 25 U.S.C. § 1300i-8(c)(2), Pet. App. 46a, and received over 90 nominations for the Yurok Interim Council. At an election conducted on October 25, 1991, five candidates were selected to serve as the Yurok governing body. Three of the petitioners here are among the elected Yurok Interim Council members: Dorothy Haberman, Richard Haberman and Maria Tripp. Under the proposed Second Amended Complaint they would be defendants as well as plaintiffs.

On March 11, 1992, the Yurok Indian Tribe filed an action in the claims court, *Yurok Indian Tribe v. United States*, No. 92-173L. The Yurok Tribe sued on its own behalf and on behalf of its members, 63 of whom are also petitioners here. However, despite petitioners' domination of the Yurok Indian Tribe's governing body, the Tribe chose not to waive its sovereign immunity or otherwise intervene in the *Shermoen* proceeding.

On December 24, 1992, the Court of Appeals, unanimously affirmed the district court's rulings and reasoning. Pet. App. A.

III. Outline of the Hoopa-Yurok Settlement Act. The portion of the Act codified at 25 U.S.C. §§ 1300i *et seq.*, as

amended, is reproduced in Pet. App. D at 33a-51a. The remainder is in Hoopa respondents' Appendix A, *infra*.

Section 2 of the Settlement Act, 25 U.S.C. § 1300i-1, provides for partition of the Joint Reservation into the new Hoopa Valley Reservation and the Yurok Reservation, conditioned upon a Hoopa Valley Tribe waiver of certain claims, including claims to the Yurok Reservation. The Hoopa Valley Tribe enacted the requisite waiver. 53 Fed. Reg. 49361 (December 7, 1988). Yurok Reservation property is similarly conditioned upon a waiver which will soon be enacted (or rejected) by the Interim Council of the Yurok Tribe. Petitioners distort the relative resources of the Hoopa Valley and Yurok reservations by, among other things, ignoring fisheries and tens of thousands of acres on the Yurok Reservation that remain Indian country. *Compare* S. Rep. 100-564 at 6, Resp. App. 13a, *with Mattz v. Arnett*, 412 U.S. 481, 483-84 (1973); *see also Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. ___, 1993 WL 155656, No. 92-259 (May 17, 1993).

Section 4 of the Settlement Act, 25 U.S.C. § 1300i-3, establishes a fund comprising all Hoopa or Yurok trust funds in existence as of the date of the Act, about $65 million, plus $10 million in federal appropriations. The tribes' shares were determined by the proportion of the Indians who affiliated with that tribe. Until the fund was divided on April 12, 1991, both the Hoopa Valley Tribe and Yurok Transition Team took "advances" from it; these were deducted from the tribes' shares.

Section 5 of the Act, 25 U.S.C. § 1300i-4, directs the Bureau of Indian Affairs ("BIA") to prepare a settlement roll using eligibility criteria established for Indians of the Reservation in *Short v. United States* ("*Short III*"), 719 F.2d 1133 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984). A 1990 amendment permits the Yurok Transition Team and the Hoopa Valley Tribe to advise the Secretary on factual

matters. With respect to *Short* plaintiffs (including 67 of petitioners here), the Bureau of Indian Affairs must follow the court's decisions on eligibility, but others qualify if the Secretary finds they can meet the court's eligibility standards. The Settlement Roll appeared in the Federal Register on March 21, 1991. 56 Fed. Reg. 12062. The official list contained 3,020 names; since then, the roll has increased to 3,672. Sixty-nine of the individual petitioners are included in the Settlement Roll; the remaining petitioner was held unqualified in the *Short* case, where she has a right to appeal.

All persons on the Settlement Roll choose among the settlement options offered by the Act. *See* 25 U.S.C. § 1300i-5(a). Pet. App. 41a. The Act establishes three choices: Hoopa tribal membership, Yurok tribal membership, or receipt of a lump sum payment in lieu of membership in either tribe. Contrary to petitioners' assertion that the options "forced them to associate for political purposes in ways that they did not choose," Pet. 10, the Act merely offers monetary and usufructuary incentives with each choice. The Hoopa Tribal Membership Option is restricted to certain residents or property owners born by October 1, 1949, who satisfy criteria in an opinion in *Short v. United States*. 25 U.S.C. § 1300i-5(b)(1). The Yurok Tribal Membership Option is available, together with a $5,000 payment ($7,500 for persons over 50), to any person on the Settlement Roll. Yurok membership must be chosen by minors unless that would violate enrollment laws of an Indian tribe. 25 U.S.C. §§ 1300i-5(a)(3), 1300i-5(c). The Lump Sum Payment Option provides an award of $15,000 in lieu of membership in either the Hoopa Valley or Yurok Tribes or rights in those tribes' reservations. 25 U.S.C. § 1300i-5(d). However, opting for the lump sum payment has no effect on persons' membership in other tribes nor does it terminate their Indian status. S. Rep. 100-564 at 24-25, Resp. App. 42a.

Each of the three Settlement Options that may be affirmatively chosen under 25 U.S.C. § 1300i-5 is accompanied by a waiver of claims the individual might have to tribal, communal, or unallotted land, property, resources, or rights of the other tribe or tribes. Persons on the Settlement Roll who do not affirmatively elect one of the statutory options, and some petitioners initially did not, are specially treated. In essence, 25 U.S.C. § 1300i-5(a)(4)(B) establishes a presumption that such persons have elected the Yurok Tribal Membership Option, together with accompanying benefits and burdens, but the presumption is rebutted if the monetary payment is rejected. S. Rep. 100-564 at 23, Resp. App. 39a-40a.

Sections 8 and 9 of the Act, 25 U.S.C. §§ 1300i-7, 8, Pet. App. 45a-48a, address tribal government. Section 8 ratifies and confirms the governing documents of the Hoopa Valley Tribe. Section 9 establishes a Yurok Transition Team, appointed by the Secretary of the Interior. The successor Interim Council of the Yurok Tribe, three of whose members are petitioners here, was elected in 1991 by those who chose Yurok membership. Section 10, 25 U.S.C. § 1300i-9, provides for submission of a plan for Yurok economic self-sufficiency.

Section 11 of the Act, 25 U.S.C. § 1300i-10, Pet. App. 49a, gives to three federally recognized Indian tribes, known as Rancherias, many of whose members are of Yurok origin, the option to merge with the Yurok Tribe if they so choose. No tribes were required to merge. Petitioner Coast Indian Community of the Resighini Rancheria voted to remain separate from the Yurok Tribe. Sections 12 and 13 address fisheries of the Karuk Tribe and Yurok Tribe and reservation timber sales. These sections are codified at 16 U.S.C. § 460ss-3 (West 1993) and 25 U.S.C. § 407 (West 1993), respectively. Resp. App. 1a-2a.

Section 14 of the Act, 25 U.S.C. § 1300i-11, Pet. App. 50a, establishes statutes of limitations for various claims arising under the Act. It also directs that challenges to the Act as a taking under the Fifth Amendment of the United States Constitution "or as otherwise having provided inadequate compensation shall be brought . . . in the United States Court of Federal Claims." This is the court in which *Short v. United States*, and related cases, have been pending for over 30 years.

SUMMARY OF ARGUMENT

This case is a poor vehicle for construing Fed. R. Civ. P. 19 because of its unique jurisdictional and sovereign immunity context. If Rule 19 needs modification, an amendment is preferable to a judicial gloss.

Since petitioners do not challenge the immunity of the absent Indian tribes, this case is also unsuitable for refining this Court's recent opinions concerning tribal sovereign immunity. Congress designated the claims court as the sole forum for those aggrieved by this complex readjustment of Indian property rights. Thus, this case presents no issue concerning the amenability to suit of Indian tribal officials because petitioners are not injured by any action of an Indian tribal official.

I. The Question Whether Judicial Review of Statutes Addressing Indian Tribes' Property Can Be Denied Is Not Ripe. Congress expressly provided a forum for challenges to the Hoopa-Yurok Settlement Act: 25 U.S.C. § 1300i-11(a), Pet. App. 50a. Because petitioners and others are litigating their grievances in the United States Court of Federal Claims this case does not squarely present the preclusion of review issues suggested by the Petitioners' Questions Presented. Until the possibility of relief in the claims court has been exhausted, injunctive and declaratory relief under these circumstances is not available. *Preseault*

v. Interstate Commerce Comm'n., 494 U.S. 1 (1990); *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

The Court of Federal Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress. . . ." 28 U.S.C. § 1491(a)(1). Congress' reference to the Claims Court forum here is broadly worded.[9] In *Heller, Ehrman, White & McAuliffe v. Babbitt*, ___ F.2d ___, 1993 WL 158142, Nos. 92-5003 and 92-5004 (D.C. Cir. May 18, 1993), the Court of Appeals dismissed a suit to enforce an implied lien against the Hoopa-Yurok Settlement Fund noting, with respect to 25 U.S.C. § 1300i-11(a):

> [T]his section does not limit the jurisdiction of the Claims Court to suits involving certain parties or seeking certain relief. The statute makes clear that "any claims" challenging the distribution of money and property under HYSA "shall be brought" in the Claims Court.

Id., slip op. at 7-8.

Each individual petitioner in this case is also a claimant in *Ammon v. United States*, Fed. Cl. No. 91-1432L, and most (the 63 petitioners who chose Yurok membership) are also represented in *Yurok Indian Tribe v. United States*, Fed. Cl. No. 92-173L. The Court of Federal Claims has not yet determined the scope of its jurisdiction

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[9] The Settlement Act states: "Any claim challenging the partition of the joint reservation pursuant to section 1300i-1 of this title or any other provision of this subchapter as having effected a taking under the fifth amendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to section 1491 or 1505 or Title 28, in the United States Court of Federal Claims." 25 U.S.C. § 1300i-11(a) (West 1993).

in these cases, which have not yet reached trial, but its decisions ultimately will be reviewable in this Court.

Whether petitioners here have waived their claims on the merits is also before the Court of Federal Claims. As noted above, 67 of the individual petitioners are also plaintiffs in *Short v. United States*, Fed. Cl. No. 102-63. The United States has pointed out in that case that "all plaintiffs accepted the benefits of the [Hoopa-Yurok Settlement] Act and all waived their claims under the general waiver provision of the Act." Defendant's Reply in Support of the Motion for Summary Judgment Re: Hoopa Valley Tribe's April 15, 1991 Per Capita Distribution at 9-10, *Short v. United States*, Fed. Cl. No. 102-63 (February 8, 1993).

Petitioners distort dictum in the lower court's opinion to speculate that their constitutional arguments can never be heard because of Rule 19. Actually, the court said:

> We realize that our decision effectively denies appellants a forum in which to have some of their grievances heard. This case serves as one more illustration, however, that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). Appellants' relief, if any is available, must be sought in the forum envisioned by Congress--namely, the Court of Claims. *See* 25 U.S.C. § 1300i-11.

Pet. App. 15a.

After full briefing on the merits of all claims, the district court concluded that petitioners seek redetermination of which groups of Indians should have received which assets of the former Joint Reservation. *See* Pet. App. 22a, 25a. The essential nature and effect of petitioners' causes of action is to reallocate Indian property and usufructuary rights. *See Ford Co. v. Dept. of Treasury*, 323 U.S. 459, 464 (1945); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1464 (10th Cir. 1989). Petitioners stress the importance of "[a] legally protected land base," Pet. 9, as against acts that "deprive tribes of their land." *Id.* They say the Settlement Act "has diminished petitioners' rights in land." Pet. 10. Even their purported First Amendment claim refers to requiring affiliation "in order to retain their interest and rights in the reservation." Pet. 8 (emphasis added). Each of petitioners' "other constitutional claims" is merely another argument designed to rationalize their requested reallocation of property and usufructuary rights. *Cf.* Pet. 6 n.4. Congress was well aware of the claims court's thirty years of experience with claims concerning the Hoopa Valley Indian Reservation when it directed that judicial review of this Act be had in that forum. S. Rep. 100-564 at 7-8, 12-13, Resp. App. 15a-16a, 22a-24a.

Nor does this case present any application of the political question doctrine, contrary to petitioners' assertion at 10. The lower court made no reference to the continuing role of the political question doctrine. *See Baker v. Carr*, 369 U.S. 186, 215 (1962).

II. A Case Turning on Indian Tribal Sovereign Immunity Is An Inappropriate Context to Address the Scope of Joinder Principles of Fed. R. Civ. P. 19. Petitioners do not contest the fact that the absent Indian tribes possess sovereign immunity and have not waived it. Nor do they explain why, although petitioners hold three out of the five votes on the governing body of the Yurok Indian Tribe, that Tribe has refused to intervene in this case and has

chosen instead to sue in the claims court. Since the claims here seek to reallocate lands, money and governmental power long held for the benefit of Indians and which Congress has now vested in Indian tribes, there can be no doubt that this case seeks to reach sovereign property. *See* S. Rep. 100-564 at 1-2, Resp. App. 5a.

Rule 19 has a special application in suits against a sovereign. For example, in *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390-91 (1980), the Court avoided the conclusion that the United States was an indispensable party because there was no "possibility of prejudice to the United States, either in its role as trustee for the Indians or in its role as manager of the ocean fishery and the dams." Professor Moore puts it this way:

> The point to be made is that despite the 1966 revision of Rule 19 to lay emphasis on the equitable aspects of the doctrine of indispensable parties, the ability to obtain relief against the sovereign by naming its officer as defendant does not depend upon a weighing of prejudice but upon statutory consent to be sued.

3A James Wm. Moore, Jo Desha Lucas, George J. Grotheer, Jr., *Moore's Federal Practice* ¶ 19.15 at 19-266 n.6 (1993).

While petitioners imply the existence of a conflict among the circuits, Pet. 13, in fact each of the five courts of appeals that has considered Rule 19 in the context of a claim to Indian property shielded by sovereign immunity has reached the same conclusion as the lower court in this case did. *E.g.*, *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543 (8th Cir. 1992); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986). This Court has declined to review at least three such decisions. *Fluent v.*

Salamanca Indian Lease Authority, 928 F.2d 542 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S. Ct. 74 (1991); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

In *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indians*, 498 U.S. 505, 111 S. Ct. 905 (1991), this Court noted:

> Congress has consistently reiterated its approval of the immunity doctrine. . . . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." . . . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at _____, 111 S. Ct. at 910. Here, Congress specifically declined to waive the tribes' sovereign immunity with respect to claims arising under the Settlement Act.[7/]

[7/] The Settlement Act indicates that tribal actions taken pursuant to the Act are shielded by immunity: "The Yurok Transition Team, or any individual thereon, shall not be named as a defendant or otherwise joined in any suit in which a claim is made arising out of this subsection." 25 U.S.C. § 1300i-11(a) (West 1993), Pet. App. 50a. That language was explained by the Senate as follows: "the [Yurok Transition] Team and its members may lack the tribal sovereign immunity that protects the Hoopa Valley Business Council and its members while acting within the scope of either their tribal governmental authority or the authorities delegated by this Act." Making Miscellaneous Amendments to Indian Laws, and for other purposes, S. Rep. 101-226, 101st Cong., 1st Sess. at 17 (November 21, 1989). (The quoted Select Committee on Indian Affairs' report referred to an earlier version of the language ultimately added to 25 U.S.C. § 1300i-11(a) in 1990 by Pub. L. 101-301, § 9(4), 104

There is no serious question that this suit seeks to adjudicate property rights in lands held in trust by the United States for the benefit of Indian tribes. Because the existence of tribal sovereign immunity is uncontested in this case, as is the fact of its non-waiver by either tribe, the lower court's routine application of the test for when a suit is one directed against sovereign property does not warrant review. *See Metropolitan Water District v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd without opinion sub nom., California v. United States*, 490 U.S. 920 (1989); *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Florida Dept. of Business Regulation v. Dept. of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

Petitioners' questions presented mischaracterize the lower court's decision as a finding of indispensability when an Indian tribe is "affected by the statute" or "claims benefits from that statute." Pet. i. In fact, the lower court held the absent Hoopa Valley and Yurok Tribes to be indispensable parties but made no such ruling with respect to the absent Karuk Tribe of California although the district court pointed out that the Act "affirmed the Karuk Tribe as federally recognized and organized." Pet. App. 18a. In addition, the Act gave the Karuk Tribe representation on the Klamath River Basin Fisheries Task Force. *See* 16 U.S.C. § 460ss-3(c)(11), Resp. App. 1a. Nor did the court suggest that every tribe owning timber was indispensable, although the Act's rewriting of 25 U.S.C. § 407 directly affected each timber tribe. Resp. App. 2a.

In practice, the Court of Appeals is well able to distinguish between those cases truly directed against the property and existence of an Indian tribe and those acts which merely benefit a tribe in some way and suits in which

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Stat. 211.)

the absent tribe would suffer little prejudice. *See Stockwest Corp. v. Lujan*, 982 F.2d 1389 (9th Cir. 1993).

III. The Claims Here Could Not Be Exempted From Rule 19 Under Any "Public Rights Exception." Petitioners' assertion that the lower court's ruling was not in "conformity with this Court's rulings," Pet. 14, particularly *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), is a weak argument for amendment of Fed. R. Civ. P. 19. This Court has not approved skipping Rule 19's factual analysis of prejudice to nonparties simply because "litigation seeks the vindication of a public right." Pet. 15. Simply invoking the Constitution as a basis for relief, as petitioners do here, provides little basis for explicating unwritten language in Rule 19.

The presence of constitutional claims with regard to Indian tribal property did not avert dismissal based on non-joinder or sovereign immunity in *Morrison v. Work*, 266 U.S. 481 (1925); *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 74 (1991); or *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). Furthermore, accepting petitioners' claims as the basis for a broad exception to Rule 19 is inconsistent with *Martin v. Wilks*, 490 U.S. 755 (1989). In *Martin*, the Court rejected arguments that nonparties should be bound by settlement agreements to avoid burdening civil rights litigation, saying: "Even if we were wholly persuaded by these arguments as a matter of policy, acceptance of them would require a rewriting rather than an interpretation of [Rule 19 and Rule 24]." *Id.* at 767.

In this case, the district court ruled that what petitioners seek to enforce are "personal" and "clearly are not public rights." Pet. App. 21a. Petitioners' own characterization confirms that conclusion:

> Before the Hoopa-Yurok Settlement Act, all Indians of the reservation communally enjoyed equal rights in the entire reservation's unallotted trust lands and resources. An Indian of the reservation's rights did not depend on whether his or her particular tribe was politically organized and/or federally-recognized.

Pet. 3. Petitioners' claim to pre-Settlement Act privileges for Indians of the Reservation "seeks reallocation of certain assets," as the district court found. Pet. App. 21a. Such unique claims provide a poor vehicle for establishing a public rights exception to Rule 19. If Fed. R. Civ. P. 19 requires modification, then this Court's rule-making power codified at 28 U.S.C. § 2071 provides a better vehicle than do the special facts of this case.[8/]

IV. This Case Presents No Issue Concerning the Availability of Injunctive Relief Against Tribal Officials Acting Beyond Their Authority. Petitioners' grievances arise from Congress' adjustment of rights and have nothing to do with any action by tribal officials. This is clear from the lower courts' descriptions of the complaint, including the passage in which, as petitioners say, "[t]he court of appeals correctly characterized the nature of petitioners' claims." Pet. 7.

Petitioners' only reference to action by an Indian tribal official concerns the portion of the Settlement Act which provides:

[8/] There is no consensus on the need to amend Rule 19. *Compare* Carl Tobias, *Rule 19 and the Public Rights Exception to Party Joinder*, 65 N.C.L. Rev. 745 (1987) *with* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U.L. Rev. 1061 (1985).

> For the sole purpose of preparing the Settlement Roll under this section, the Yurok Transition Team and the Hoopa Valley Business Council may review applications, *make recommendations which the Secretary shall accept unless conflicting or erroneous*, and may appeal the Secretary's decisions concerning the Settlement Roll.

25 U.S.C. § 1300i-4(d)(4); Pet. App. 40a (emphasis added). *See* Pet. 6 n.5. Other than this general statement, petitioners identify no specific action by any individual tribal officer that aggrieves them or that supports the relief they seek.

Furthermore, petitioners have no standing to assert that recommendations of tribal officials might have constricted the Settlement Roll. Petitioners' protected interests have not been invaded by a tribal official nor is there any "causal connection between the injury and the conduct complained of . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. ___, 112 S. Ct. 2130, 2136 (1992). The single petitioner who was excluded from the Settlement Roll, Carol Leigh McConnell Ammon, suffered an adverse judgment on her entitlement claim in *Short v. United States*, Fed. Cl. 102-63, on November 1, 1990. This adverse judgment, which is appealable, compelled the Secretary to exclude her from the Settlement Roll. 25 U.S.C. § 1300i-4(a)(2). Pet. App. 39a.[9/] Ms. Ammon's exclusion had nothing to do with an action of a tribal official. Petitioners therefore lack standing to present an issue regarding tribal

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[9/] That subsection provides: "The Secretary's determination of eligibility under this subsection shall be final except that . . . any *Short* plaintiff determined by the United States Court of Federal Claims not to be an Indian of the Reservation shall not be eligible for inclusion on [the Hoopa-Yurok Settlement] Roll." (West 1993)

officials' actions. Participation by tribal officials in the recommendation process is now moot, since the Hoopa-Yurok Settlement Roll was completed and published two years ago. 56 Fed. Reg. 12062 (March 21, 1991).

In cases that actually involve unlawful acts by tribal officials there is no doubt that relief against the officers is available. As this Court indicated in *Oklahoma Tax Comm'n. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 515, ____, 111 S. Ct. 905, 912 (1991): "We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908)." If various panels of the Ninth Circuit Court of Appeals are in disagreement concerning the applicability of *Ex parte Young*, and respondents see no indication of that, then the views expressed in *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 3031 (1992), will eventually be reconciled with the views expressed by the lower court here.

The lower courts in this case correctly found that the claims were directed against sovereign property, not tribal action, and that Congress has provided no waiver of sovereign immunity.

The district court's bench ruling shows its recognition that petitioners' effort to name tribal officials as defendants was merely a subterfuge. The court states: "It's utterly foolish to think you can get around and cut out the sovereign immunity of the tribes by simply suing tribal officials. . . . [T]here is no possibility of stating a cause of action taking away something over which the tribes have sovereign immunity." Pet. App. 30a. Similarly, the Court of Appeals stated:

> The real party in interest in the amended complaint is therefore the sovereign tribe;

> indeed, were it not so, the amended complaint would not remedy the lack of adequate representation which necessitated dismissal of the complaint in the first place.

Pet. App. 13a.

As the Court recognized in *Block v. North Dakota*, 461 U.S. 273 (1983), the waiver of sovereign immunity found in the Quiet Title Act, 28 U.S.C. § 2409a, cannot be expanded through the device of an officers' suit. In fact, 28 U.S.C. § 2409a(a) expressly "does not apply to trust or restricted Indian lands."

Also, Congress has not acted with respect to Indian tribes as it has with respect to federal officials. In 1976, the Administrative Procedure Act was amended to provide that claims "shall not be dismissed nor relief therein be denied on the ground that [the suit] is against the United States or that the United States is an indispensable party." 5 U.S.C. § 702 (1988). As a result, a suit nominally directed against a tribal official which in fact seeks what is unquestionably sovereign property is barred by both the sovereign immunity of the United States and of the Indian tribes. Because this case seeks to reach sovereign property it does not present any question of the availability of relief against tribal officials acting without lawful authority.

V. Neither the Presence of Other Parties Nor the Participation of Hoopa Respondents Obviated the Need to Make The Hoopa Valley and Yurok Tribes Parties. This issue will be mooted by the question whether petitioners' suit seeks to reach the property and governmental rights of absent Indian tribes possessing sovereign immunity. If it is such a suit against a sovereign, consent-to-suit is the real issue, not the presence of individuals who cannot bind the absent sovereign. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (where sovereign immunity is not

waived, the presence of officials of the sovereign as defendants does not allow suit to proceed); *United States v. Shaw*, 309 U.S. 491, 501 (1940) (no official is empowered to consent to suits against the United States); *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) (signature of tribal chairman on promissory note did not waive sovereign immunity).

The adequacy of representation issue comes from Fed. R. Civ. P. 24(a). Inadequate representation exists "if the applicant shows that representation of his interests 'may be' inadequate and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

Petitioners say: "Obviously, there is a conflict between petitioners and the United States," Pet. 16 n.12, yet they maintain that it is "impossible for the United States to have a conflict with the absent tribes in this situation." Pet. 16. The flaw in this reasoning is the premise that all of the interests involved stem from the Act that petitioners seek to nullify. But petitioners and the absent tribes had rights both before passage of the Hoopa-Yurok Settlement Act and afterwards. The United States has legal obligations both to petitioners and to the absent tribes regardless of the position it adopts in this litigation. *See Short v. United States*, 719 F.2d 1133, 1136 (Fed. Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984) (wrongful distribution of timber income and other funds); *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986) (management of reservation fisheries); *Coast Indian Community of the Resighini Rancheria v. United States*, 550 F.2d 639 (Ct. Cl. 1977) (reservation right-of-way); *Short v. United States*, 12 Cl. Ct. 36, 41-42 (1987) (use of reservation revenues to support tribal government). Because of the conflicting duties that the United States has to the petitioner tribe and individuals on the one hand and to individuals and absent tribes on the other hand, it is plain that the presence of federal officials

as defendants could not mean that the absent tribes were adequately represented.

Petitioners quote selectively from the papers below to argue with the lower court's findings that the four Hoopa members, who sought to intervene as defendants, did not adequately represent the absent tribe. Hoopa defendants' unopposed motion sought intervention "as individuals." CR#9 at 7. The Hoopa defendants explained that they intervened "to protect their individual interests only, not on behalf of the interests of the Tribe." CR#74 at 2, 4, 5-6. As intervenors they supplied the district court with examples of situations in which the interests of tribal members differed from those of the tribe itself. Hoopa defendants also pointed out that they were not a majority of the Hoopa Valley Tribal Council and had no authority to waive the Tribe's immunity. The district court stated: "[I]t is quite clear that the Hoopa Valley Tribe members who are present are appearing in their individual capacities and not as representatives of the Tribe." Pet. App. 21a n.3.

The Court of Appeals concluded that Hoopa defendants would not undoubtedly make all of the absent tribes' arguments, particularly since Hoopa defendants were unwilling to serve in that role. The Court stated:

> [T]he Act affects the rights of the intervenors as individuals, in addition to benefitting the tribe to which they belong and which appellants would have them represent. Given this potential conflict, we cannot with any certainty conclude that the intervenors would be willing to make all of the arguments of the absent tribe.

Pet. App. 10a-11a. Petitioners now attack the court's findings concerning the intervenors' willingness to make the Tribe's argument, stating: "the Hoopa respondents' counsel

also represents the Hoopa Valley Tribe in *Short* and related matters; if there were really a conflict of interest, he could not do so." Pet. 19. However, Rules of Professional Conduct 1.7 and 1.8 do not prohibit a lawyer from representing potentially adverse clients who consent after consultation and a full disclosure of the material facts. Hoopa respondents intervened to assert that their tribe was an indispensable party, an argument that was not adverse to their tribe's interests. CR#25 at 16. In any event, petitioners' speculation that the absent Hoopa Valley Tribe might be adequately represented at some time or for some purposes does nothing to suggest that Hoopa defendants adequately represent the absent Yurok Tribe.

CONCLUSION

Petitioners' claims are pending in suits brought in the forum that Congress made available, the United States Court of Federal Claims. If anything, petitioners have too many forums, not too few. There will be ample opportunity for this Court to consider petitioners' claims when that court reaches the merits.

For all of these reasons the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

May 26, 1993

Respectfully submitted,

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APPENDIX A

Portions of Hoopa-Yurok Settlement Act codified at
25 U.S.C. § 407 and 16 U.S.C. § 460ss-3

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.—Section 4(c) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss-3) is amended—

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) SPECIAL RULE.—The initial term of the representative appointed pursuant to section 4(c)(11) and (12) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of members of the Task Force then serving. Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.

SEC. 13. TRIBAL TIMBER SALES PROCEEDS USE.

Section 7 of the Act of June 25, 1910 (36 Stat. 857; 25 U.S.C. 407) is amended to read as follows:

"SEC. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used——

"(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or

"(2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.".

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0020/09561.1\APPENDIX.A

APPENDIX B

Calendar No. 1025

100th Congress, *2d Session* } SENATE { Report 100-564

PARTITIONING CERTAIN RESERVATION LANDS BETWEEN THE HOOPA VALLEY TRIBE AND THE YUROK INDIANS, TO CLARIFY THE USE OF TRIBAL TIMBER PROCEEDS, AND FOR OTHER PURPOSES

September 30 (legislative day, September 26), 1988.—Ordered to be printed

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Mr. Inouye, from the Select Committee on Indian Affairs, submitting the following

REPORT

[To accompany S. 2723]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2723) to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute.

PURPOSE

S. 2723, introduced by Senator Cranston on August 10, 1988, is a bill to partition certain reservation lands between

two tribes in the northern part of the State of California: the Hoopa Valley Indian Tribe and the Yurok Tribe, and to resolve long standing litigation between the United States, the Hoopa Valley Tribe and a large number of individual Indians, most, but not all of whom are of Yurok descent, who have asserted an individual interest in the communal reservation property. The claims were originally asserted in 1963 in the yet to be finalized case of *Short* v. *United States* filed in the United States Court of Claims, and has led to a number of companion or collateral cases which have made it impossible for the Hoopa Valley Tribe to perform normal tribal governmental functions, including the management of a significant portion of the reservation property.

The legislation will partition the reservation into two reservations, one consisting of the Hoopa Valley Square to be set aside for the use and benefit of the Hoopa Valley Tribe, and the other consisting of the Hoopa or Klamath Extension, to be set aside for the use and benefit of the Yurok Tribe. The authority of the Hoopa Valley Tribe to govern the Hoopa Valley Square and its interests in the assets of the Square will be confirmed. The Yurok plaintiffs are authorized to organize and adopt a constitution and the property and governmental rights of the Yurok Tribe in the Extension will be confirmed. A communal escrow account which now exceeds $65 million will be allocated between the Hoopa Tribe and the Yurok or "Short" plaintiffs. Limited per capita payments from the accrued escrow account are authorized for each of the tribes. A third portion is used to provide additional payments to persons who do not wish to become members of the newly organized Yurok Tribe. The remaining dollars are then allocated to the Yurok Tribe for governmental or development purposes.

This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square and establish and confirm its property interest in the Square. The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension,

including its interest in the fishery, and enable the tribe to organize and assume governing authority in the Extension.

This legislation should not be considered in any fashion as a precedent for individualization of tribal communal assets. The solutions fashioned in this legislation spring from a series of judicial decisions that are unique to the Hoopa Valley Indian Reservation that have established certain individual interests that conflict with the general federal policies and laws favoring recognition and protection of tribal property rights and tribal governance of Indian reservations. The intent of this legislation is to bring the Hoopa Valley Tribe and the Yurok Tribe within the mainstream of federal Indian law.

The Yurok Tribe is a federally recognized tribe, but it is not organized and there is no established roll of members. This legislation enables the tribe to organize and to establish its base roll. Persons who are not members of the Hoopa Tribe but who meet certain criteria under the *Short* case are authorized to elect whether or not they wish to become an enrolled member of the Yurok Tribe, with all of the rights and benefits that that entails, including provision of federal services springing from membership in a federally recognized tribe. All minor children meeting the criteria will be deemed to be members of the Yurok Tribe unless they are already enrolled in another federally recognized tribe whose membership criteria forbids dual enrollment in another tribe.

HISTORY

ABORIGINAL TRIBES AND LANDS OF NORTHERN CALIFORNIA

The lands of what is now northern California, like most of the Pacific coastal area, were aboriginally inhabited by many small tribes or bands of Indians of numerous linguistic stocks or derivations. Representatives [sic] tribes in the general area of dispute included the Hoopa (Hupa), Chilula, Whilkut, and Nongati of Athapascan derivation; the

Yurok and Wiyot of Algonkian derivation; the Karok (Karuk), Shasta, and Chimariko of Hokan stock; and the Wintun of the Penutian language.

The original location of these tribes centered upon the drainages of the Klamath and Trinity Rivers and adjacent streams in extreme northwestern California. The Klamath River flows southwesterly out of southern Oregon to its junction with the Trinity River (which flows north and is essentially a branch of the Klamath) and, then, veering sharply to the northwest, continues to the ocean. As noted by the Court of Claims in the *Jessie Short* case, the two rivers form a "Y" whose arms are the Klamath and whose trunk is the Trinity.

The aboriginal lands of the Yurok or Klamath Indians were generally centered on the drainage of the valley of the Klamath River from the Pacific Ocean to its fork with the Trinity River. These lands lay northward from that fork and westward to the Pacific. The lands of the Wiyot, a tribe related to the Yurok, were south of the Yurok lands in a narrow strip along the ocean.

The aboriginal lands of the Hupa or Hoopa Indians were centered on the drainage of the Hoopa Valley of the Trinity River southward from its fork with the Klamath. The lands of the related tribes of the Chilula, Whilkut, and Nongatl lay to the west and south of the Hoopa lands and eastward of the Yurok and Wiyot lands.

The aboriginal lands of the Karok, and the related Shasta and Chimariko tribes, lay to the east of the Hoopa and Yurok lands on the upper drainages of both the Klamath and Trinity Rivers. The Wintun lands were southeast of the Hoopa lands along the upper drainage of the south fork of the Trinity River.

Although some scholars disagree, the U. S. Court of Claims noted in the case of *Jessie Short et al.* v. *The United States* (202 Ct. Cl. 870, 886):

> The Indian tribes of Northern California were not organized or large entities;

> Indians resident on a particular river or fork were a "tribe". Tribal names were often applied inexactly and usually meant only a place of residence. To call an Indian a "Hoopa" or a Trinity Indian meant he was an Indian resident in the valley of the Trinity called Hoopa. The names "Yurok" and "Karok" . . . also meant a place of residence.

IMPACT OF WHITE SETTLEMENT

These small Indian tribes or bands had only minimal contact with non-Indians, primarily Spanish settlers to the south or occasional fur-trading or exploration parties, until the discovery of gold in 1849. With that discovery came the well-known influx of gold seekers and other white settlers and immigrants. As the white population grew and white settlements expanded, the conflicts with local Indian tribes and bands increased in number and intensity. White settlers sought to push the Indians off their lands and demanded that local and Federal governments take steps to remove the Indians to other areas. Backed upon the Pacific Ocean, the tribes had no place else to go and the inevitable hostilities and warfare between Indians and whites began to occur.

The huge influx of whites into the area and the resulting wars had a devastating impact upon the Indian tribes. In 1850, only two years after the United States had acquired the territory from Mexico, Federal officials recognized that something had to be done quickly for the tribes. Indian Sub-agent Adam Johnston wrote that the white men had taken Indian lands and resources, introduced strange diseases, and provoked violent confrontations.

In other areas, the government had tried to relocate the Indians before the advance of white settlers; but there were already more than 100,000 whites in California, which became a state on September 9, 1850. It was decided that the best policy was to set aside small tracts of land in the new state for the tribes to protect them from the worst effects of

settlement by separating them from the whites. At the same time, vast tracts of Indian lands would be opened to eager white settlers and miners.

To effectuate this policy, Congress provided for the appointment of treaty commissioners in September of 1850 to secure the cession by the Indians of their lands and to establish reservations for them. By the end of 1851, numerous treaties with many Indian tribes or bands, including those of northern California, had been signed. On June 28, 1852, President Fillmore presented eighteen California treaties to the Senate for ratification. Because of strong white opposition to providing any lands for the Indians, the Senate, in secret session, rejected the treaties on June 28, 1852. With the rejection of these treaties, the conflicts and hostilities between white settlers and Indian tribes resumed.

In northern California, much of the warfare and bloodshed was centered in the valleys of the Klamath and Trinity Rivers which were the traditional homelands of the Yurok and Hoopa Indians and related tribes.

ESTABLISHMENT OF KLAMATH RIVER RESERVATION

In an early attempt to carry out the policy adopted with respect to California Indian tribes, President Pierce, by Executive Order of November 16, 1855, established the Klamath River Reservation for the benefit of Indian tribes in that general area. The President acted pursuant to the Act of March 3, 1853 (10 Stat. 226, 238), as amended in 1855, authorizing the creation of seven military reservations in California or in the Territories of Utah and New Mexico.

As finally established, the Klamath River Reservation was "a strip of territory commencing at the Pacific Ocean and extending 1 mile of width on each side of the Klamath River" for a distance of approximately 20 miles, containing 25,000 acres. The reservation was within the aboriginal territory of the Yurok and, at the time of its creation, was occupied by about 2,000 Indians of the Yurok tribe, also known as the

Klamaths. However, the Hoopa and other inland tribes refused to move onto this reservation and armed conflict in those areas continued.

ESTABLISHMENT OF THE HOOPA VALLEY RESERVATION

In 1864, in a further effort to bring about peace in California, Congress enacted legislation (Act of April 8, 1864, 13 Stat. 39) reorganizing the Indian Department in California by providing for the appointment of one superintendent of Indian Affairs and authorizing the President to establish four reservations in the State. On May 26, 1864, the President appointed Austin Wiley as Superintendent.

On August 12, 1864, at Fort Gaston, Wiley negotiated an agreement with the Hoopa Indians along the Trinity River entitled "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians." Section 1 of the agreement provided that--

> The United States . . . by these presents doth agree and obligate itself to set aside for reservation purposes for the sole use and benefit of the tribes of Indians herein named, or such tribes as may hereafter avail themselves of the benefit of this treaty, the whole of Hoopa valley, to be held and used for the sole benefit of the Indians whose names are hereunto affixed as the representatives of their tribes.

Section 2 provided that the reservation "shall include a sufficient area of mountain on each side of the Trinity river as shall be necessary for hunting grounds, gathering berries, seeds, etc." This agreement or "treaty" was never submitted for ratification. However, with corrections, it was approved by the Interior Department.

On August 21, 1864, at Fort Gaston, California, Superintendent Wiley issued a proclamation, under the authority of the 1864 Act and instructions from the Interior Department, establishing the Hoopa Valley Reservation on the Trinity River in Klamath County, California. Wiley's proclamation provided that the metes and bounds of the reservations would be established later by order of the Interior Department, subject to the approval of the President.

The Trinity River in the Hoopa Valley flows north through the valley to the junction of the Trinity and Klamath Rivers. Since the reservation was described as extending six miles on each side of the river to the junction of the two rivers, the reservation formed a 12-mile square bisected by the last 12 miles of the Trinity River, and has come to be called the "Square" or the "12-mile Square". As of February 18, 1865, when Wiley defined the boundaries of the Hoopa Valley Reservation, there have been identified, among the various tribes resident there, a substantial number of Indians of the Hoopa Tribe living in several villages in the Hoopa Valley proper, a smaller group of Lower Klamath or Yurok Indians living in a few villages in the northern and northwestern part of the reservation, and a number of Indians of the Redwood or Chilula tribe.

On June 23, 1876, President Grant issued an executive order formally establishing the boundaries of the Hoopa Valley Reservation and provided that the land embraced therein "be, and hereby is, withdrawn from public sale, and set apart in California by act of Congress approved April 8, 1864." As bounded, the reservation was a square, twelve miles on a side, now recognized as encompassing approximately 88,665.52 acres.

The Court of Claims in the *Jessie Short* case found that, at about the time of the 1876 Executive Order, there had been identified as living within the boundaries of the reservation established the following tribes:

Tribe	1875	1876
Hoopas	571	511
Klamaths (Yuroks)	43	44
Redwoods	46	12
Saias	56	13

CREATION OF THE "ADDITION"

In the late 1880's and early 1890's, the legal validity of the 1855 Klamath River Reservation came under attack. There was growing pressure from surrounding white settlers to open these lands to homesteading. In addition, the Department of the Interior sought to control the activity of non-Indians on the reservation. In 1888, the United States brought suit against a non-Indian trader on the reservation for unauthorized activity. The district court, in an 1888 decision later upheld by the circuit court in 1889, held that the Klamath River Reservation did not have legal status as an Indian reservation. *United States* v. *Forty Eight Pounds of Rising Star Tea etc.*, 35 Fed. 403. The court held that the President's power to establish Indian reservations in California was controlled by the 1864 Act which provided for only four such reservations and that the President had exhausted his power thereunder by establishing four reservations, including the Hoopa Valley Reservation.

In order to protect the Klamath or Yurok Indians residing on the Klamath River Reservation, the Department sought to find a way to preserve reservation status. Since the 1864 Act limited the number of Indian reservations in California to four and since there were already four reservations established pursuant to that Act, the 1855 reservation could not be validated by a further executive order establishing it as a reservation. In order to get around the limitations of the 1864 Act, the Interior Department used the provisions of the 1864 Act itself.

On October 16, 1891, President Harrison issued an executive order which enlarged the Hoopa Valley Reservation "to include a tract of country 1 mile in width on each side of the Klamath River, and extending . . . to the Pacific Ocean.".[sic] In effect, the order incorporated the questionable 1855 Klamath River Reservation into the Hoopa Valley Reservation by connecting the two reservations with a strip of land one mile on either side of the Klamath River extending 25 miles from the southern boundary of the Klamath River Reservation to the northern boundary of the Hoopa Valley Reservation.

After the addition of lands by the 1891 order, the combined reservation contained about 147,000 acres, 25,000 in the original Klamath River Reservation, 33,168 acres in the "Connecting Strip", and 88,666 acres in the original Hoopa Valley Reservation or "Square".

Even though the 1891 order combined the two reservations, they continued to be treated by the Department and the Indian Service, in some respects, as two reservations, the "Addition" for the Klamath River or Yurok Indians and the "Square" for the Hoopa Indians. In 1892, Congress, by the Act of June 17, 1892 (27 Stat. 52), provided for the allotment of lands on the "Klamath River Indian Reservation" to "any Indians now located upon said reservation" and the sale of the remainder for homestead purposes. In addition, from that date forward until the present, the Department of the Interior continued to administer the combined reservations as if they were still two reservations for certain purposes.

Under this method of administration, the Hupa or Hoopa Tribe was generally recognized as being located on, and owning, the "Square" portion of the reservations. The Indians on the "Square" later formally organized a tribe and tribal government as the Hoopa Valley Tribe. The Department generally recognized the land of the original Klamath River Reservation and the 1891 "extension" as the reservation of the Yurok tribe. That tribe has never organized.

1891 TO 1955

From 1891 to 1955, the official position of the Department of the Interior and the Bureau of Indian Affairs (Indian Service) regarding the rights of tribes in the Hoopa Valley Reservation varied with the official involved and the issue under consideration.

As noted earlier, for many purposes, the "Square" and the "Addition" were treated as two separate reservations and the Yurok or Klamath Indians and the Hoopa Indians were treated as two separate tribes. Indeed, the allotment of the lands of the reservation to individual Indians and the opening of the remainder to white homesteading under various Acts of Congress dealt with the reservation as three separate tracts: the original Klamath River reservation; the "Connecting Strip"; and the "Square". Yet, official correspondence in certain years relating to the allotment process of the three tracts evidences an understanding that there was only one reservation and that the right of individual Indians to allotments were to be determined from that perspective.

The attitude of Federal officials during this time relating to the existence of tribal status and the early attempts of the Hoopa and Yurok Indians to organize was equally vacillating and confusing. In some respects, these officials encouraged and approved of efforts to organize separate entities and councils representing the two tribes. Yet, conflicting correspondence exists indicating an understanding that these separate organizations could only represent local interests and could not act with respect to the reservation as a whole.

By 1952, however, when the Commissioner of Indian Affairs approved the constitution and bylaws of the Hoopa Valley Tribe, the position of the Department, at least on a de facto basis, was that the "Square" was a reservation for the Hoopa Valley Tribe and subject to the management of the Hoopa Valley Business Council elected pursuant to that constitution. Under the constitution, the Department

recognized the membership of the Hoopa Valley Tribe which did not include most of the Yurok or Klamath Indians.

JESSIE SHORT V. UNITED STATES

This administrative position continued basically unchallenged until 1955, when substantial tribal revenues from the sale of commercial timber from the "Square" began to be realized. Beginning in 1955, the Secretary of the Interior began to credit revenue derived from the "Square" to a trust account separate from revenue earned from other portions of the Hoopa Valley Reservation.

From January of 1955 until February of 1969, the Secretary, upon the request of the Hoopa Valley Business Council, each year disbursed from the Hoopa Valley trust fund per capita payments to the Indians on the official roll of the Hoopa Valley Tribe. The total amount of such funds disbursed per capita was $12,657,666.50. (Subsequently, on 21 separate occasions commencing on April 10, 1969, and ending on March 7, 1980, additional per capita payments amounting to some $16,660,492 were made to individual Hoopa Indians on the official roll of the Hoopa Valley Tribe.)

In 1963, certain Indians [()identified as "Yurok" Indians) claiming descent from Indians allotted on the reservation, but not enrolled as members of the Hoopa Valley Tribe, brought a suit against the United States in the United States Court of Claims in the case of *Jessie Short et al.* v. *U. S.* (Ct. Cl. 102-63) alleging that the government had wrongfully excluded them from sharing in the per capita payments from revenues of the communal lands of the Square made by the Secretary from 1955 onward. In 1972, a Tribal [sic] Commissioner of the Court of Claims sustained the plaintiffs' position. His decision was later upheld on October 17, 1973, by the Court of Claims (202 Ct. Cl. 870) and the Supreme Court refused to review the decision in 1974.

In construing the various relevant laws and executive orders noted above, the court held that--

(1) the Hoopa Valley Reservation, as established by the Executive Order of June 23, 1876, pursuant to the 1864 Act, and as augmented by the addition of land under the Executive Order of October 16, 1891, was a single Indian reservation;

(2) no Indian tribe as a tribe had, or has, a vested right to the ownership of, the reservation or its resources;

(3) the reservation had been duly set apart for Indian purposes in 1876 to accommodate the Indian tribes of northern California;

(4) the Secretary had wrongfully paid per capita payments only to members of the Hoopa Valley Tribe to the exclusion of the plaintiffs; and

(5) that any Indian who had certain connections to the reservation and who could meet the court's standards for qualification as an "Indian of the Reservation" was entitled to share in the distribution of revenues from the "Square" and, therefore, was entitled to damages against the United States.

The court in the *Short* case is now engaged in determining which of the plaintiffs meet that criteria. Once this process has been completed, the court will enter judgment against the United States on behalf of each individual plaintiff found to meet that criteria.

PUZZ V. UNITED STATES

The decision of the Court of Claims in the *Short* case involved a money damage claim against the United States by individual Indians with respect to their right to share in the revenue derived from the resources of the "Square" upon individualization by the Secretary. The case did not deal with the issue of where the authority to make management

decisions relating to the lands and resources of the "Square" or, for that matter, the reservation as a whole was vested.

In 1980, some of the plaintiffs in the *Short* case filed suit against the United States in the United States District Court for the Northern District of California in the case of *Puzz* v. *U. S.* (No. C 80 2908 TEH). In this case, the plaintiffs challenged the right of the United States to recognize the governing body of the Hoopa Valley Tribe as the sole governing authority of the reservation entitled to manage the reservation resources. On April 8, 1988, the court held that the reservation, as extended, was intended for the communal benefit of northern California Indian tribes and groups and that, absent statutory delegations, existing tribes lacked power to manage the resources. The Court ordered the Bureau of Indian Affairs to assume the management of the reservation and its resources and to consult fairly with all persons having an interest in the reservation on its decisions.

BACKGROUND

NATURE OF U. S.-INDIAN RELATIONSHIP

From the earliest contact with the Indians of this continent, the European powers and the United States have dealt with the Indians on a government-to-government or tribal basis. The historical development of the relationship between the United States and the Indian tribes, whether it is denominated as a trust, guardianship, or government-to-government relationship, has resulted in a political relationship focusing on the Indian tribes, not on individual Indians.

The great mass of treaties, statutes, and executive orders implementing Federal Indian policy are premised upon this tribal, political relationship. To the extent such laws confer special benefits on individual Indians or impose special burdens or limitations on such Indians or their property, these laws are nevertheless founded upon the status of such Indians

as members of Indian tribes enjoying a political relationship with the United States.

The Supreme Court, in upholding the constitutionality of the law extending a preference to Indians for Federal employment in the Bureau of Indian Affairs, held that the law, and the many other Federal laws for the benefit of Indians, were not invidiously discriminatory because the laws were not based upon the racial background of the individual, but upon their status as members of an Indian tribe. *Morton* v. *Mancari*, 417 U.S. 535 (1974). In those limited cases where the Congress has legislated specially with respect to individual Indians outside their relationship as a member of an Indian tribe, other National grounds are, or will be, found.

CREATION OF INDIAN RESERVATIONS

Where the United States has not recognized the title of an Indian tribe to its aboriginal lands, usually through creation of a permanent reservation for such tribe from those aboriginal lands, the tribe does not have a compensable title in such lands and the Congress may take the lands without incurring a liability to the tribe. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

As a consequence of the nature of the relationship between Indian tribes and the United States, Indian reservations were recognized or set aside by treaty, statute, or executive order for Indian tribes, not individual Indians. In most cases, the enabling law specifically denominated the Indian tribes [sic] or tribes for whose benefit the reservation was established.

In certain cases, particularly with respect to reservations established by executive order, the source authority does not designate a particular tribe as the beneficiary of the reservations. In those cases, discretion is left in the responsible executive official to later designate the tribe or tribes to be settled on such reservation. Until such official has acted under that discretion, no tribe is deemed settle[d] on the reservation. In the December 16, 1882,

Executive Order establishing a reservation for the Hopi Tribe, the language set the lands apart for the "Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Federal court found that the Secretary did not settle the Navajo Tribe on that reservation until long after 1882.

Whether the establishing instrument designates a tribe or tribes as beneficiaries of the reservation or leaves to the discretion of an executive official the authority to later designate beneficiary tribes, in every case, the reservation is set aside for tribal or communal purposes. Individuals have an interest in resources of the reservation only insofar as they are members of the tribal entity for whose benefit the reservation is set aside.

Where the law creating an Indian reservation designates the tribe(s) for whose benefit the reservation is created and where it is clear that the reservation is intended for the permanent benefit of such tribe, the beneficial interest in the reservation becomes vested in that tribe and the power of Congress to deal with the property is limited. Congress, in the exercise of its plenary power over Indian affairs, may modify or take the tribe's property interest in such reservation, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), but, in doing so, will be held to one of two standards.

Congress may act as trustee for the benefit of the Indians and, if it makes a good faith effort to replace the property taken with property of equal or nearly equal value, it will not be held to the 5th Amendment standard. If it take the tribe's property for the United States or for others without making such good faith effort, such action will constitute a 5th Amendment taking. *Shoshone Tribe* v. *U. S.*, 299 U.S. 476 (1937); *Three Tribes of Fort Berthold Reservation* v. *U. S.*, 182 Ct. Cl. 543 (1968); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980).

In other cases, particularly with respect to executive order reservations, the law creating an Indian reservation may not designate the tribe for whose benefit it is intended or, where discretion is left to an executive official to so designate

a tribe, that discretionary authority may not have been exercised or exhausted. Or such law may not be clear that the reservation is intended for the permanent benefit of Indians. In those cases, no right, as against the exercise of the plenary power of Congress, has vested in any tribe and Congress may deal with that property as it sees fit without subjecting the United States to a liability for an unconstitutional taking. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949); *Healing* v. *Jones*, 174 F. Supp. 211; 210 F. Supp. 125 (1962), aff'd. 373 U.S. 758; *Crow Nation* v. *United States*, 81 Ct. Cl. 238, 279-80 (1935).

RECOGNITION OF INDIAN TRIBES; TRIBAL MEMBERSHIP

As noted above, the relationship between the United States and Indian tribes is a political one. While the validity of congressional or administrative actions may depend upon the existence of tribes, the courts have made clear that it is up to Congress or the Executive to extend recognition of that status. *Handbook on Federal Indian Law*, 1982, p. 3-5; *U. S.* v. *Rickert*, 188 U.S. 432 (1903). While the power of Congress, in the exercise of its plenary power over Indian affairs under the Commerce clause, to extend political recognition to an Indian tribe is very broad, it cannot be used arbitrarily. In *U. S.* v. *Sandoval*, 231 U.S. 28, 46 (1913), the Supreme Court held:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as independent tribes requiring the guardianship and protec-

> tion of the United States are to be determined by the Congress, and not by the courts.

As the power of Congress to extend such recognition is very broad, so also is the power to terminate that recognition. *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968).

In general, an Indian tribe has the power to establish its own membership and membership requirements and this right has been consistently recognized by the Congress and the courts. Tribal membership and membership requirements are normally determined by the tribal governing authorities, typically under a tribal constitution or other recognized governing documents.

Nevertheless, Congress retains broad power to determine or modify, for various purposes, a tribe's membership. The United States may assume full control over Indian tribes and determine membership in the tribe for the purpose of adjusting rights in tribal property. *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899). Congress may disregard existing tribal membership rolls.

In the case of *Sizemore* v. *Brady*, 235 U.S. 441, 447 (1914), the Supreme Court said:

> Like other tribal Indians, the Creeks were wards of the United States, which possessed full power, if it deemed such a course wise, to assume full control over them and their affairs, to ascertain who were members of the tribe, to distribute the lands and funds among them, and to terminate the tribal government.

And it is clear that tribal membership does not confer upon the individual a vested right in tribal or communal property. As stated in *Handbook on Federal Indian Law*, 1982, p. 605-606:

> It is well established that title to the communal land or personal property of a tribe resides in the tribe itself and is not held by tribal members individually. An individual member cannot convey title to any particular tract of tribal land and has no right against the tribe to any specific part of tribal property, absent a federal law or treaty granting vested rights to individual members. . . . A member's right to tribal property is no more than prospective and inchoate unless federal law or tribal law recognizes a more definite right. [Citations omitted.]

STATUS OF HOOPA VALLEY RESERVATION

The decisions of the United States Court of Claims in the case of *Jessie Short et al.* v. *United States* (Ct. Cl. No. 102-63) and related cases, with respect to the interest of individual Indians in the revenues from the Hoopa Valley Reservation, and the decision of the Federal district court in the case of *Puzz* v. *United States*, with respect to the obligation to manage the resources of that reservation, while perhaps correct on the peculiar facts and law, have had a very unhappy result.

It is clear from the 1864 Act authorizing the establishment of Indian reservations in California and the 1876 and 1891 Executive Orders creating the Hoopa Valley Reservation pursuant to such Act that the reservation was created for tribal or communal Indian purposes. This is consistent with the foregoing discussion and with the law of the case in the *Short* case.

Yet, the Court of Claims in the *Short* case very clearly has held that neither the organized Hoopa Valley Tribe, the unorganized Yurok Tribe, nor any other Indian tribe has any vested right to the benefits the Hoopa Valley Reservation. This, too, is consistent with the foregoing discussion. The 1876 Executive Order, creating the Hoopa Valley Reservation, merely provides that it is "set apart for Indian purposes".

Since, as noted, reservations are set aside for Indian tribes, since no tribes were designated in the order, and since the court did not find that the Secretary had definitely used or exhausted his discretion to settle any Indian tribe on the reservation, it is clear that no tribal vested rights, as against the plenary power of Congress to deal with the property, have arisen. This applies not only of Hoopa and Yurok tribal entitlements but also of Karuk claims and claims of groups such as the Tolowa, Wintun and Shasta who are currently seeking federal recognition of tribal status pursuant to 25 C.F.R. Part 83.

The Conclusions of Law by the Federal district court in the *Healing* v. *Jones* case might be instructive. [T]he 1882 Executive Order creating the reservation did designate the Hopi Tribe as a beneficiary, but retained with the Secretary the right "to settle other Indians thereon". In Conclusion of Law No. 2, the court stated:

> By force and effect of the Executive Order of December 16, 1882, . . . the Hopi Indian tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the **non-vested** (emphasis added) right to use and occupy the entire reservation . . . subject to the paramount title of the United States, and subject to such diminution in the rights . . . so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

It is the Committee's conclusion that, as found by the *Short* case, no constitutionally protected rights have vested in any Indian tribe in and to the communal lands and other resources of the Hoopa Valley Reservation. In carrying out the trust responsibility of the United States under Congress' plenary power, the Committee finds that H.R. 4469, as reported, is a reasonable and equitable method of resolving

the confusion and uncertainty now existing on the Hoopa Valley Reservation.

While the court in the *Short* case has found that no tribe have [sic] a vested right in the reservation, it was equally clear on the point that none of the plaintiffs nor any other individual has a vested right in the property. Again, this holding of the court is consistent with the discussion above on the rights of tribal members in tribal property. Two cites from the Federal courts' several decisions in this case may be helpful. In a 1983 decision of the Circuit Court in this case, the court said:

> At the close of our opinion we again stress--what the Court of Claims several times emphasized and we have interlaced supra--that *all* we are deciding are the standards to be applied in determining those plaintiffs who should share as individuals in the monies from the . . . Reservation unlawful withheld by the United States. . . . This is solely a suit against the United States for monies, and everything we decide is in that connection alone; neither the Claims Court nor this court is issuing a general declaratory judgment. We are not deciding standards for membership in any tribe, band, or Indian group, nor are we ruling that Hoopa membership standards should or must control membership in a Yurok tribe or any other entity that may be organized on the Reservation.

In its March 17, 1987, decision, the court said:

> . . . an individual Indian's rights in tribal or unallotted property arise only upon individualization; individual Indians do not hold vested severable interests in unallotted tribal lands and monies as tenants in common.

Again, the Committee agrees with the court in the *Short* case that neither the plaintiffs nor any other individuals have a vested right in the Hoopa Valley Reservation as against the right of Congress to make further disposition of that property. As noted above, Congress has power to make determinations about tribal membership with respect to the adjustment of participation in tribal property. The power is even more clear in this case, where, except for the Hoopa Valley Tribe, there is no organized tribe which has a definable membership.

The Committee is also aware that although Congress later authorized the establishment of additional reservations in California, the Act of April 8, 1864 authorized the establishment of four reservations, including Hoopa Valley, Round Valley, Tule River and Mission. As noted above, in the *Puzz* case, a federal district court construed the Act as requiring that the Bureau of Indian Affairs run the Hoopa Valley Reservation for the benefit of all individuals (including non-tribal members) who had ancestral connections with the Reservation, and also construed the Act as prohibiting the exercise of reserved tribal sovereign powers by Indian tribal governments, with respect to the Hoopa Valley Reservation. The Committee believes that the *Puzz* case is confined to the peculiar facts and law applicable to the Hoopa Valley Reservation, and it is the purpose of S. 2723 to reject the application of this view of the 1864 Act to any California reservation. S. 2723 should therefore help ease the concerns of other tribal councils whose reservation lands are affected in whole or in part by the 1864 Act or similar legislation. It is not true, as a general rule, that federally recognized tribal governing bodies on reservations set apart for more than one historical tribal group need federal authority conferred upon them in order to exercise territorial management powers. Application of such a rule would seriously interfere with tribal sovereignty and modern federal Indian policy.

SETTLEMENT PROVISIONS

S. 2723, as reported by the Committee, is a fair and equitable settlement of the dispute relating to the ownership and management of the Hoopa Valley Reservation. The Section-by-Section Analysis and Explanation which follows sets out in detail the provisions of the bill.

The bill provides for the partition of the joint reservation between the Hoopa Valley Tribe and the Yurok Tribe. As noted, the Committee has concluded that there are no tribal or individual vested rights in the reservation and that Congress has full power to dispose of the reservation as proposed. As a consequence, the Committee need not overly concern itself with precise comparable values in such partition. The Committee intends to deal fairly with all the interests in the reservation, and believes it has done so. The nature of the interests involved here, however, is such that Congress need not precisely determine, or provide, the full value that a fee simple interest in these lands and resources might have.

It is alleged that the "Square", to be partitioned to the Hoopa Valley Tribe, is much more valuable than the "Addition" which is to go to the Yurok Tribe. Tribal revenue from the "Square" is in excess of $1,000,000 annually. Tribal revenue derived from the "Addition" recently has totalled only about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the "Addition" is also in excess of $1,000,000 a year. The Committee also notes that because of the cooperative efforts of the Hoopa Valley Tribe and other management agencies to improve the Klamath River system, and because of the Fisheries Harvest Allocation Agreement apportioning an increased share of the allowable harvest to the Indian fishery, the tribal revenue potential from the "Addition" is substantial. While in recent years tribal income from the "Square" has exceeded tribal income from the "Addition," it is the judgment of the Committee that a functioning tribal government fulfilling the Congress' and the

Executive's policy of self-determination merits a certain financial deference over a group of Indians which has previously elected not to have a functioning tribal government. See Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, codified at 25 U.S.C. §§ 450, et seq.; President's statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 99 (Jan. 24, 1983); S. Con. Res. 76, ordered reported, Senate Indian Committee, 100th Cong., 2nd Sess. (1988). Furthermore, the Committee is acting out of concern that the Hoopas have tended to live on the reservation and that their government be accorded sufficient resources to provide the services necessary to sustain their habitation. Indeed the majority of the Indians living on the combined reservation live on the "Square." The record shows that the Hoopa Valley Business Council is the only full-service local governmental organization on the combined reservation, and has been the major government service provider in the extremely isolated eastern half of Humboldt County. The Hoopa Valley Tribe was recognized by the Congress as warranting federal assistance and support for its self-governance efforts. Conf. Rep. No. 498, 100th Cong., 1st Sess. 889.

As noted elsewhere in this report, the proposed partition is also consistent with the aboriginal territory of the two named tribes involved, particularly since the Hoopa Valley Tribe formally organized in a way encompassing all Indian allotted land on the Square.

The bill also provides for certain settlement options to be made available to individual Indians who can meet the requirement of the court for qualification as an "Indian of the Reservation". With the exception of a limited option to become a member of the existing Hoopa Valley Tribe, the settlement options are either to become a member of the Yurok Tribe or to elect a buy-out option. The settlement terms are to be supported primarily through the use of funds earned from the reservation and maintained by the Secretary in escrow accounts.

The Committee wishes to make very clear that this offer of options by way of settlement of this problem in no way is to be construed as any recognition of individual rights in and to the reservation or the funds in escrow.

LEGISLATIVE HISTORY

On April 26, 1988, Congressman Bosco introduced H.R. 4469 to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber lands, and for other purposes. The bill is co-sponsored by Representatives Coelho and Miller of California. The intent of the legislation is to resolve a long-standing controversy between the Hoopa Valley Tribe which is organized under constitutional provisions approved by the Secretary of the Interior and persons who are primarily, but not exclusively, of Yurok Indian descent.

On August 10, 1988, the House Committee on Interior and Insular Affairs adopted an amendment in the nature of a substitute and ordered H.R. 4469 reported. The bill is scheduled for a further hearing before the House Judiciary Committee on Friday, September 30, 1988.

On June 30, 1988, Chairman Inouye held an oversight hearing in Sacramento, California, to receive testimony on the general background of the problems and issues on the Hoopa Valley Reservation. This hearing was not directed to specific legislation, but was only for purpose of collecting background information.

On August 10, 1988, Senator Cranston introduced S. 2723, which is identical to H.R. 4469 as ordered reported. The Select Committee held hearings on this bill on September 14, 1988. On September 29, 1988, the Select Committee in open business session, adopted an amendment in the nature of a substitute, and ordered the bill reported with a recommendation that the bill, as amended, be passed.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on September 29, 1988, by unanimous vote of a quorum present, adopted an amendment in the nature of a substitute and ordered the bill reported with a recommendation that S. 2723, as amended, be passed by the Senate.

SECTION-BY-SECTION ANALYSIS

There follows a section-by-section analysis of S. 2723 a[s] reported and, where appropriate or necessary, a further explanation of the provisions of the bill.

SECTION 1 - SHORT TITLE AND DEFINITIONS

Subsection (a) provides that the Act may be cited as the "Hoopa-Yurok Settlement Act".

Subsection (b) contains definitions of various terms used in the bill.

Among the more important definitions is the definition of "Escrow funds", which lists the accounts maintained by the Secretary of the Interior into which income from reservation economic activity (as opposed to individual trust monies) are deposited; "Indian of the Reservation", which is a term of art developed in the *Short* case to define those persons entitled under *Short* and companion cases as eligible plaintiffs in the claims against the United States arising from the distribution of income from reservation wide economic activities; and definition of "Short cases" to include all companion cases filed thus far.

SECTION 2 - RESERVATIONS; PARTITION AND ADDITIONS

Subsection (a), paragraph (1), provides that, when the Hoopa Valley Tribe adopts a resolution waiving certain claims and granting consent as provided in paragraph (2), the Hoopa Valley Reservation as now constituted and as defined by the Federal Court in the *Short* case, shall be partitioned as provided in subsection (b) and (c). A technical amendment is added to make clear that the partition is linked to recognition and confirmation of the governing documents of the Hoopa Valley Tribe, as provided in Section 8.

Paragraph (2) provides that the partition of the reservation as provided in paragraph (1) shall not be effective unless the Hoopa Valley Tribe adopts a tribal resolution within 60 days of enactment waiving any claim they may have against the United States arising out of the provisions of the Act. The Secretary is required to publish the resolution in the Federal Register.

An amendment is added to make clear the consent of the Hoopa Valley Tribe to the contribution of the escrow funds to the Settlement Fund. This amendment was requested by the Justice Department. The Committee does not intend that the requirement for a Hoopa tribal waiver under this section or the Yurok tribal waiver requirement under section 9(d)(2) shall constitute a congressional recognition that such tribes or any other Indian tribe may have vested rights in the lands and resources of the joint reservation. In *Hynes* v. *Grimes Packing Co.*[,] 337 U.S. 86, 103 (1949), the Supreme Court held that an executive order reservation "conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President."

Subsequent cases establish that the compensable right of a tribe in an executive order reservation depends upon its status as a confirmed or unconfirmed reservation. The exact legal status of the reservation is unclear from the various Federal court decisions relating to it. However, the

decision[s] of the Court of Claims in the *Short* case and the District Court in the *Puzz* case make clear that no existing Indian tribe as a tribe, including the Hoopa and Yurok tribes, have a vested right in the assets and resources of the Hoopa Valley Reservation as now constituted.

The Committee also does not intend that the waivers of the tribes, if given, shall present [sic] the tribes from enforcing rights or obligations created by this Act.

Subsection (b) provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "Square" shall be recognized as the Hoopa Valley Reservation and shall be a reservation for the Hoopa Valley Tribe. The Committee notes that, while the record before the Committee and the findings of the court in the *Short* cases show that the "Square" included aboriginal lands of the Yurok or Klamath Indians, most of the lands of the "Square" were within the aboriginal territory of the Hoopa and related bands and villages. This partition also conforms generally with the geography of the reservation which, as currently constituted, comprises two river drainages.

Subsection (c), paragraph (1), provides that, effective with the partition as provided in subsection (a), that portion of the reservation known as the "extension", excluding the lands of the Resighini Rancheria, shall be recognized as the Yurok Reservation and shall be a reservation for the Yurok Tribe. The Committee again notes that the lands comprising the new Yurok reservation were within the aboriginal lands of the Yurok or Klamath bands or villages. Karuk tribal aboriginal lands generally lay upstream of Yurok lands along the Klamath River, outside of the Yurok and Hoopa Valley Reservations.

Paragraph (2) provides that, subject to all valid existing rights, all national forest lands in the Yurok Reservation and about 14 acres of the Yurok Experimental Forest shall be transferred to the Yurok Tribe in trust. These lands contain buildings which will be immediately utilized by the Yurok Tribe. The Committee, therefore, expects the Secretary of the Interior to work with the Yurok Interim

Council to ensure that these facilities are cleaned and renovated as soon as possible. This clean-up and renovation should be accomplished under the BIA's existing facilities maintenance and repair budget. In addition, the Secretary shall within six months report to Congress concerning the advantages, disadvantages, and procedural aspects of conveying to the Yurok Tribe all National Park System lands within the Yurok Reservation. If the Secretary does not recommend immediate conveyance of such lands, his recommendation shall include a proposed inter-governmental agreement which, pending any conveyance, will assure Yurok tribal hunting, fishing, and gathering rights, and reasonable ceremonial and religious access and use on such lands within the reservation.

Paragraph (3) provides that the existing authority of the Secretary to acquire lands for Indians and Indian tribes under the Indian Reorganization Act of 1934 shall be applicable to the Yurok Tribe. $5,000,000 is authorized to be appropriated and is directed to be used for land acquisition for the Yurok Tribe with the limitation that such funds can be used to acquire land outside the reservation only for purposes of exchange for lands inside. An amendment is added to permit acquisition of lands adjacent to and contiguous with the Yurok reservation. The Committee expects that the Secretary will make use of this and other authority to, among other things, insure that Indian lands within the reservation are not, or do not become, landlocked. The Committee is aware that the acquisition of new lands will increase the costs of land and resource management. The Committee, therefore, directs the Secretary to consider these additional costs when preparing the future budgets of the Yurok Tribe.

Paragraph (4) provides that (1) the transfer of funds to the Yurok Tribe under section 4 and 7; (2) the land transfer under subsection 2(c)(2); (3) the land acquisition authority of section 2(c)(3); and (4) the organizational authorities for the Yurok Tribe under section 9 shall not be effective unless the Interim Council of the Yurok Tribe adopts a resolution waiving any claims it might have against

the United States under this Act and granting consent as provided in section 9(d)(2). Section 9 of the bill provides for an Interim Council to be elected by the General Council of the tribe.

Subsection (d) provides that the boundary line between the Hoopa Valley and Yurok reservations, as partitioned in this section, shall be the line established by the Bissel-Smith survey and that the Secretary shall publish the boundary descriptions in the Federal Register. Use of the Bissel-Smith survey for purposes of defining the Hoopa Valley Indian Reservation results in the addition of lands to the Yurok Reservation in the upper reaches of the extension near the junction of the Klamath River with the Trinity River. The transition village known as "Peekta" Point, claimed by the Yurok Tribe, now apparently becomes part of the Yurok Reservation.

Subsection (e) provides for the management of the tribal lands of the Yurok Reservation by the Secretary until the organization of the tribe under section 9 and, thereafter, by the Yurok Tribe.

Subsection (f) provides that the State of California shall continue to have criminal and civil jurisdiction on the two reservations under Public Law 83-280 with authority to retrocede such jurisdiction to the United States.

SECTION 3 - PRESERVATION OF SHORT CASES

Section 3 provides that nothing in this Act shall affect, in any way whatsoever, the individual entitlements already established in the various decisions of the Federal courts in the so-called *Short* cases nor any eventual entry of final judgment in those cases.

When final judgment is entered in the *Short* cases, the court will have determined which of the 3,800 intervening individual plaintiffs have met the standards of the court for qualification as an "Indian of the Reservation" and will have determined the amount of monetary damages to which each such individual plaintiff is entitled from the United States.

Nothing in this legislation is intended to affect the right of such individuals to that final award under the law of the case. While the Committee does not believe that this legislation, as a prospective settlement of this dispute, is in any way in conflict with the law of the case in the *Short* cases, to the extent there is such a conflict, it is intended that this legislation will govern.

SECTION 4 - HOOPA-YUROK SETTLEMENT FUND

Subsection (a), paragraph (1), establishes a Hoopa-Yurok Settlement Fund into which the Secretary is directed to deposit all Escrow funds, together with accrued income, derived from revenue of the reservation. The definition of the Excrow [sic] funds is intended to be a comprehensive list of the funds and accounts, in federal hands, derived from the lands or resources of the joint reservation. It is estimated that this amount now totals approximately $65,000,000.

Paragraph (2) permits the Secretary to continue to make payments to the Hoopa Valley Tribe, out of the interest or principal of the Settlement Fund, for tribal governmental and management purposes, excluding per capita payments, in an amount not to exceed $3,500,000 per fiscal year. These payments will be deducted from what would otherwise be the Hoopa Valley Tribe's share as apportioned by subsection (c).

Paragraph (3) as added by the Committee authorizes the Secretary to provide appropriated funds to the Yurok Transition Team, and also authorizes the Secretary to make payments to the Yurok Transition Team, out of the interest or principal of the Settlement Fund, for the purposes for which the Yurok Transition Team is established under section 9, in an amount not to exceed $500,000 per fiscal year. These payments will be deducted from what would otherwise be the Yurok Tribe's share as apportioned by subsection (d).

Subsection (b) provides that the Secretary shall make payments from the Settlement Fund as provided in this Act and, pending dissolution of the Fund, shall administer and invest such funds as Indian trust funds are administered.

Subsection (c) directs the Secretary, upon publication of the option election date pursuant to section 6(a)(4), to pay out of the Fund and to hold in trust for the Hoopa Valley Tribe an amount which shall be based upon the percentage arrived at by dividing the number of members of the Hoopa Tribe as of such date by the sum of the number of such members and the number of persons on the final roll prepared pursuant to section 5. After the elections pursuant to section 6 have been made, the payment to the Hoopa Valley Tribe shall be increased or decreased based on the persons who are enrolled in the Tribe pursuant to section 6. Under this formula, it is estimated that approximately $23 million will be paid to the Hoopa Tribe. This is roughly one-third of the entire Settlement Fund.

Subsection (d) directs the Secretary to make a similar payment for the Yurok Tribe with the amount being determined by dividing the number of persons on the Settlement Roll electing to be members of the Yurok Tribe by the sum of the number of members of the Hoopa Tribe, as determined under subsection (c), and the number of persons on such roll prepared under section 5. The amount allocated to the Yurok Tribe will be based on how many individuals meeting the *Short* case standards elect to become members of the Yurok Tribe. If only 25% of the adults eligible accept the Yurok membership option, approximately $6.7 million remaining in the Settlement account, for a total tribe share of $18.1 million. According to the pro-organization Yurok group the 25% membership estimate is extremely low. They estimate that the percentage accepting tribal membership will exceed 50%. If this is true the Yurok Tribe will receive in excess of $23.5 million. This is roughly one-third of the entire Settlement Fund.

Subsection (e) authorizes the appropriation of $10,000,000 for deposit in the Settlement Fund as the Federal share after Hoopa and Yurok tribal payments pursuant to section 4 and the payments to the Yurok member[s] pursuant to section 6(c) are made. The Fund, with the Federal share

and with any earned income, is to be available to make the payments authorized by section 6(d).

As noted elsewhere in this report, it is in large part due to the unjust, historical treatment of California Indians by the United States, to the enactment and promulgation of confusing and ambiguous laws, and to the vacillating and uncertain policies of U.S. officials that [t]his unfortunate situation now exists. The Committee feels that $10,000,000 of Federal funds, added to the funds of the Indians, is a small price to pay to rectify this situation and permit implementation of the federal policy of government-to-government relations with the Hoopa Valley and Yurok Tribes.

SECTION 5 - HOOPA-YUROK SETTLEMENT ROLL

Subsection (a) directs the Secretary to prepare a roll of all persons who can meet the criteria established by the Federal courts in the *Short* case for qualification as an "Indian of the Reservation" and who also (1) were born on or prior to, and living on, the date of enactment; (2) are citizens of the United States; and (3) were not members of the Hoopa Valley Tribe as of August 8, 1988. The Secretary's determination is final except that plaintiffs in the *Short* cases who have been found by the Federal court to meet the qualification as an "Indian of the Reservation" shall be included on the roll if they meet the other requirements and those who are found by the court not to meet such qualifications may not be included on the roll. Persons who are not plaintiffs in the *Short* cases may also be included on the roll if they timely apply and meet the criteria established. The Committee expects the Secretary to place on the roll the names of all living Indians of the Reservation held qualified in the *Short* cases whether or not an application is timely received from such persons, since address changes or other unforeseen event may prevent persons from receiving actual notice, and the qualifications of such persons are readily verified.

Subsection (b) requires the Secretary, within 30 days of enactment, to give notice of the right to apply for enrollment under this section. It requires actual notice by registered mail to *Short* plaintiffs, notice to their attorneys, and notice in local newspapers. Such notice is also to be published in the Federal Register.

Subsection (c) establishes the deadline for applications as 120 days after the Federal Register publication in subsection (b).

Subsection (d), paragraph (1), provides that the Secretary shall make his determinations of eligibility and publish a final roll in the Federal Register 180 days after the date established in subsection (c).

Paragraph (2) requires the Secretary to establish procedures for the consideration of appeals from applicants not included on the final roll. These appeals will not prevent the roll from being made final. Successful appellants are to be later added to the roll and any payments they become entitled to, as a result of the election of options, are to be paid from any funds remaining in the Settlement Fund before payment to the Yurok tribe as provided in section 7. The subsequent inclusion of such persons on the roll, and any election of option they may make, are not to affect any calculations made for the payments to the Hoopa and Yurok Tribe under section 4. However, deletion of persons found erroneously to have been included on the roll may lead to adjustment of the calculations and payments made under section 4.

Subsection (e) provides that anyone not included on the final Settlement Roll shall not have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, or the Yurok Tribe or in the Settlement Fund unless they may be subsequently admitted to tribal membership by either of those tribes. The provisions of this subsection are not intended to imply an congressional determination that such persons do now have any such interest. Nor are these provisions intended to imply that the federal Indian status of any person would be lost by omission

from the final Settlement Roll. These are not termination provisions, as explained under section 6(d).

SECTION 6 - ELECTION OF SETTLEMENT OPTIONS.

As noted elsewhere, the court has determined that, while the lands and resources of the Hoopa Valley Reservation as now constituted are tribal or communal property, neither the Hoopa or Yurok Tribe nor any other tribe has a vested right in such property. Where the tribal property right is vested, if at all, is problematical and probably remains with the United States subject to disposition pursuant to the rationale of the *Hynes* v. *Grimes Packing Co.* case.

In any case, under the general theories of Federal-Indian law and under the law of the case of the *Short* cases, it is the Committee's conclusion that no individual, including persons meeting the qualifications of the court as an "Indian of the Reservation" or members of the Hoopa Valley Tribe, separately or collectively, have any legally enforceable right in the lands and resources of the reservation.

Therefore, the settlement provisions of this section are not to be construed as a congressional recognition, directly or impliedly, that such individuals have any such right or that the payments or benefits conferred by this section are in payment for the taking of any such rights. The Committee is seeking to further the responsibility of the Congress and the United States as the trustee and guardian of Indian tribes and property to resolve the chaos and uncertainty now affecting these Indians, these tribes, and this property. The benefits made available to individuals under this section are a recognition that they may have an inchoate or expectancy interest in such property and that, as a matter of fairness, they should be given reasonable options for settlement.

It is also the Committee's intent that the election of an option under this section, together with all the valuable benefits which flow therefrom, shall constitute a waiver by the individual so electing of any claim such person may have

against the United States arising out of this Act except those created by sections 5 and 6.

Subsection (a), paragraph (1), provides that, 60 days after publication of the Settlement Roll, the Secretary shall give notice by registered mail to all adult persons on the roll of their right to elect an option under the Act.

Paragraph (2) provides that the notice must be comprehensive with an objective analysis of advantages and disadvantages of each option, but couched in easily understood language. S. 2723, as introduced, would provide that the election of an eligible adult would bind minor children under their guardianship who are also on the roll. The Committee deleted this provision and amended paragraphs (2) and (3) [to] provide that minor children will be deemed to have elected membership in the Yurok Tribe, with certain exceptions. In addition, the Committee added language specifying that the notice discuss counseling services that the Yurok Transition Team and the Secretary shall provide, and the affidavit requirement of section 6(d).

Paragraph (3) as amended by the Committee, automatically makes minors on the roll members of the Yurok Tribe unless the parent or guardian comes forward with proof, satisfactory to the Secretary, that the minor is enrolled in another tribe that prohibits members from enrolling elsewhere. Thus, in the case of a child who is already an enrolled member of another federally recognized tribe, such parent or guardian may elect the tribe in which such child will be enrolled. Therefore, with respect to minors on the roll who do not also have a parent or guardian on the roll, notice is to be given to the parent or guardian of such minor. The paragraph further directs that the minor's funds be invested and administered as Indian trust funds, like the Settlement Fund itself, until the age of majority is reached.

Paragraph (4) provides that the Secretary shall establish the deadline for making a choice as the date which is 120 days after the date of promulgation of the Settlement Roll as provided in section 5(d). Persons not making an election by the date established under this paragraph are

deemed to have made an election under subsection (c). The Committee believes it is important that no person on the Hoopa-Yurok Settlement Roll lose benefits and privileges flowing from Yurok tribal membership and connection with the Yurok Reservation by virtue of inadvertence, failure to receive actual notice, accident or other unforeseeable events. Accordingly, persons failing to act timely will be deemed to have elected Yurok tribal membership if they accept and cash the check representing the payment authorized by subsection (c).

The Committee believes that acceptance of the payment also establishes the consensual release of rights that accompanies this election. On the other hand, one who fails or refuses to make an election, and refuses to accept the payment authorized by subsection (c) may not be deemed to have granted a release or to have granted a proxy to the Yurok Interim Tribal Council. Thus, refusing to accept the payment is one method by which persons who do not wish to join the Yurok Tribe may avoid becoming members. Persons already enrolled in another Indian tribe that prohibits dual enrollment may, for example, wish to decline Yurok tribal membership. In addition, a person who becomes a member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses. E.g., F. Cohen, Handbook of Federal Indian Law 22 (1982 Ed.).

Subsection (b), paragraph (1), provides that any person on the roll, 18 years or older, who can meet certain membership criteria of the Hoopa Valley Tribe as established by the U.S. Claims Court and who (1) maintains a residence on the reservation on the date of enactment; (2) had, within five years prior to enactment, maintained such residence; or (3) owns an interest in real property on the reservation can elect to become a member of the Hoopa Valley Tribe.

Paragraph (2) provides that the Secretary shall cause such person to be so enrolled notwithstanding any laws of the Hoopa Valley Tribe to the contrary and, after being so enrolled, such person will be a full member of the tribe for all purposes.

Paragraph (3) provides that the Secretary will assign to such person the degree of Indian blood or Hoopa Indian blood, as appropriate, based upon the criteria established by the Federal Court in the *Short* case.

Paragraph (4) provides that any person making such an election shall no longer have any interest in the Yurok Reservation, the Yurok Tribe, or the Settlement Fund. This paragraph and paragraphs (c)(4) and (d)(2) do not contemplate that such persons now have any particular interest, but that, to the extent they do, it will be automatically relinquished upon an election of one of the options.

Subsection (c), paragraph (1), provides that any person on the final roll may elect to become a member of the Yurok Tribe and participate in the organization of the tribe pursuant to section 9.

Paragraph (2) provides that persons making such election shall form the base membership roll of the Yurok Tribe and the Secretary shall assign to a person making such an election the degree of Indian blood determined using the criteria of the Federal court.

Paragraph (3) directs the Secretary, to pay to each person under age 50 and making an election under this subsection $5,000 out of the Settlement Fund; $7,500 for those age 50 or older. These sums were established on the basis of the Committee's amendment. The distribution of such funds shall be subject to the provisions of Section 7 of the Act of October 19, 1973 (87 Stat. 466), as amended (25 U.S.C. § 1407).

Paragraph (4) provides that persons making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation or the Hoopa Valley Tribe or, except as provided in paragraph (3), in the Settlement Fund. As amended by the Committee, additional language is included to provide that the exercise of the option shall authorize the Yurok Interim Council to waive claims of the Yurok Tribe against the United States.

Subsection (d), paragraph (1), provides that any person on the final roll can make an election to receive a lump sum payment from the Settlement Fund and directs the Secretary to pay to each such person the amount of $15,000 out of the Settlement Fund. This sum was decreased from the $20,000 provided in S. 2723 as originally introduced. Election of this option, however, has been conditioned by the Committee upon completion of an affidavit concerning counseling regarding the effects of such an election. This subsection does not suggest, and the Committee does not intend that this Act change the federal Indian status of any person, regardless of the option elected, nor does this Act end federal trust restrictions that may exist as to any allotted or unallotted trust land, property[,] resources or rights. The option provided by section 6(d) is not a termination provision; it merely offers a lump-sum payment to persons on the settlement roll who wish to have no future interests or rights in the tribal, communal, or unallotted land, property, resources, or rights in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes. By contract [sic], the language of the Western Indians Termination Statute declared that the purpose of the Statute was, among other things, "for a termination of Federal services furnished such Indians because of their status as Indians." 25 U.S.C. 691. That termination Act provided that:

> Thereafter individual members of the Tribe shall not be entitled to any services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians . . . shall no longer be applicable to the members of the Tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or

persons within their jurisdiction. 25 U.S.C. 703(a)(1982)

Neither section 6(d) nor any other provision of this Act is so intended. This Act does not represent a return to a national policy of termination or of encouraging tribal members to withdraw from their tribes. However, the circumstances concerning this reservation and the complex litigation which has prevented tribal self-determination justify the congressional role in restoration of tribal self-governance represented by this Act.

Paragraph (2) provides that any person making an election under this subsection shall no longer have any interest in the Hoopa Valley Reservation, the Hoopa Valley Tribe, the Yurok Reservation, and the Yurok Tribe and, except as provided in paragraph (2), in the Settlement Fund.

SECTION 7 - DIVISION OF SETTLEMENT FUND REMAINDER

Subsection (a) provides that any funds remaining in the Settlement Fund after payments made pursuant to section 6 and to successful appellants shall be shall be held in trust by the Secretary for the Yurok Tribe.

Subsection (b) provides that funds apportioned to the two tribes by section 4 and 6 shall not be available for per capita distribution for a period of ten years after the date of division made under this section. Other tribal funds, or income of the apportioned funds, are not intended to be restricted by this subsection. As amended by the Committee this would allow the Hoopa Tribe to make one or more per capital payments to its members from such funds, totalling not more than $5,000, a sum similar to that provided for those electing to become members of the Yurok Tribe. There is no provision for a bonus payment to those 50 years or older since no election is involved and the Hoopa members have been receiving the full range of federal services over the years. Under the Act of August 1, 1983, the Committee understands

that payments on behalf of minor tribal members shall be held in trust accounts and invested for the minors.

SECTION 8 - HOOPA VALLEY TRIBE; CONFIRMATION OF STATUS

Section 8 preserves, ratifies, and confirms the existing status of the Hoopa Valley Tribe as a Federally-recognized tribe and reinstates full recognition of its governing documents and governing body as heretofore recognized by the Secretary.

In the record before the Committee and in the findings of the court in the *Short* cases, some significance is attached to the fact that some members of the Hoopa Valley Tribe had admixtures of the blood of the Yurok or other tribes or, in some cases, that such admixture was greater than their Hoopa blood. The Committee does not attach any significance to this fact by itself nor does it find that this admixture of tribal blood detracts from the integrity of the Hoopa Valley Tribe as a tribe of Indians. Most, if not all, Federally-recognized Indian tribes have members who are not of the full degree of blood of the ancestral tribe. Through inter-tribal marriages, most Indian tribes have a membership of mixed Indian blood. Indeed, most have a membership with mixed Indian and non-Indian blood. The Hoopa Valley Tribe clearly has and continues to function as an Indian tribe in the political sense.

SECTION 9 - RECOGNITION AND ORGANIZATION OF THE YUROK TRIBE

This section provides for the development of a membership for a Yurok Tribe and for its organization. The Committee realizes that there may be some people on the Settlement Roll who will have little or no Yurok Indian blood who may wish to select this option. The discussion under section 8 above is relevant here.

Subsection (a), paragraph (1), provides that those persons electing the Yurok Membership option under section 6 shall form the base roll of the Yurok Tribe whose status as a Federally-recognized tribe, subject to the adoption of the Interim Council resolution required by subsection (c), is ratified and confirmed. The Committee substituted the term "Interim Council" for the term "General Council."

Paragraph (2) provides that the Indian Reorganization Act of 1934 shall apply to the Yurok Tribe.

Paragraph (3) directs the Secretary promptly to consult with the Select Committee on Indian Affairs, the House Insular and Interior Affairs Committee and any other appropriate committee and, within 30 days of enactment, appoint five individuals to compromise [sic] the Yurok Transition Team. Since the Interim Council will not be nominated or elected until after preparation of the Settlement Roll and election of options, a process that will take over one year, a Transition Team to aid the Yurok Tribe's organizational process is essential.

A key function of the Yurok Transition Team is to provide counseling to persons who are or may be eligible for inclusion in the Hoopa-Yurok Settlement Roll with respect to inclusion in the Settlement Roll, the advantages and disadvantages of each of the settlement options available under section 6, and related issues. In particular, the Yurok Transition Team must counsel people concerning the current or potential benefits which will or may be derived by membership in the Yurok Tribe or the Hoopa Valley Tribe, and from connections with the Yurok or Hoopa Valley reservation. This must include discussion of any possible effect on the future tribal membership of children of individuals who may elect the option of sections 6(c) and 6(d). However, this paragraph does not suggest, and the Committee does not intend that any part of this Act change the federal Indian status of any person, for purposes of programs and benefits in which membership in a federally recognized Indian tribe is not a prerequisite, regardless of the option elected. Nor does this Act end federal restrictions that may exist as to

any allotted or unallotted trust land or resources. As noted elsewhere, the option provided by section 6(d) is not a termination provision; and it should not be portrayed as such; the subsection merely offers a lump-sum payment to persons on the Settlement Roll who wish to have no future interest or right in the tribal, communal, or unallotted land, property, resources, or rights of the Hoopa Valley Reservation or the Yurok Reservation or the Hoopa or Yurok tribes.

Subsection (b) provides for the creation of an Interim Council for the Yurok Tribe of five members to represent the Yurok Tribe in the implementation of the Act and to act as the tribal governing body until a tribal council is elected under a constitution adopted pursuant to this section.

Subsection (c), paragraph (1), provides that the Secretary, within 30 days of the deadline for election of options, shall prepare a list of all adults on the Settlement Roll who elected the Yurok Membership option who will constitute the eligible voters of the tribe for organizational purposes. The Secretary must send them notice of date, time, purpose, and order of procedure of the general council meeting to be scheduled pursuant to paragraph (2).

Paragraph (2) provides that, within a set time after such notice, the Secretary shall convene a general council meeting of the Yurok Tribe on or near the Yurok Reservation. The business of such meeting is to nominate candidates for election to the Interim Council. Only persons on the list prepared under paragraph (1) are eligible for nomination. As amended by the Committee the resolution waiving claims against the United States may be executed by the Interim Council based upon the proxies received from persons electing tribal membership.

Paragraph (3) provides that, within 45 days after the general council meeting, the Secretary shall conduct an election for the Interim Council from among the persons nominated. Absentee balloting and write-in voting is to be permitted. The Secretary must give the eligible voters adequate notice of the election.

Paragraph (4) requires the Secretary to certify the results of the election and to convene an organizational meeting of the newly elected Interim Council.

Paragraph (5) provides that vacancies on the Council shall be filled by a vote of the other members.

Subsection (d), paragraph (1), provides that the Interim Council shall have no powers except those conferred by this Act.

Paragraph (2) provides that the Council shall have full authority to secure the benefits of Federal programs for the tribe and its members, including those administered by the Secretary of the Interior and the Secretary of Health and Human Services and shall have authority to execute the necessary waiver of claims against the United States, and consent to allocation of the escrow funds to the Settlement Fund.

Paragraph (3) provides that the Council shall have such other powers as the Secretary normally recognizes in an Indian tribal governing body, except that it may not legally or contractually bind the tribe for a period in excess of two years from the date of their election. The Committee's amendment revised this language to provide that any contract of more than two years duration will be subject to disapproval by the Secretary of the Interior under limited circumstances.

Paragraph (4) provides that the Interim Council shall appoint a drafting committee which shall be responsible for the development of a draft constitution for submission to the Secretary.

Paragraph (5) provides that the Interim Council shall be dissolved upon election of the initial governing body under such constitution when adopted or at the end of two years after their installation, whichever occurs first.

Subsection (e) provides that the Secretary, upon the request of the Interim Council and the submission of the draft constitution, shall take all steps necessary under the provisions of the Indian Reorganization Act for the adoption of a tribal constitution and the election of the initial tribal council under such constitution when adopted. The Committee recognizes

that the Yurok Tribe has a sovereign right to select tribal membership provisions for its constitution. The Tribe may prohibit the dual enrollment of Yurok tribal members in other Indian tribes, for example, as many other tribes do. Both because it is the Yurok Tribe's right to determine its membership criteria and because the Tribe will have to live with the consequences of its decision, the Committee is reluctant to require inclusion of specific membership provisions. Nevertheless, the Committee hopes and presumes that children born after the date of enactment of this Act (who of course are not included in the Hoopa-Yurok Settlement Roll) and who meet the applicable Indian blood requirement, if any, established by the Yurok Tribe, but whose parents may have elected the option of section 6(d) will nevertheless be favorably considered for enrollment in the Yurok Tribe although their parents may not be members of the Yurok Tribe. The Committee is concerned that an injustice will occur if the Yurok Tribe prohibits the enrollment of children born after the date of enactment of this Act who possess the necessary blood quantum required by the Yurok Tribe's constitution, but whose parents elected the lump-sum option instead of enrollment in the Yurok Tribe.

It is not intended by this section that the Indian Reorganization Act shall provide the only means by which the Yurok Tribe may be organized. Nor does the Committee intend that the Constitution prepared by the drafting committee pursuant to subsection (e) is the only one upon which the Secretary may conduct an election in the future.

SECTION 10 - ECONOMIC DEVELOPMENT

The amendment added a new Section 10 directing that a plan for economic self-sufficiency for the Yurok Tribe be developed and submitted to Congress by the Secretary of the Interior, in conjunction with the Interim Council of the Yurok Tribe and the Yurok Transition Team, to determine the long-term needs of the Tribe. The Secretary is expected to seek

the assistance and cooperation of the secretaries of Health and Human Services and other federal agencies. The Committee is aware that the Yurok Tribe has not received the majority of services provided to other federally recognized tribes. As a result, it lacks adequate housing and many of the facilities, utilities, roads and other infrastructure necessary for a developing community. In addition, the Committee is aware that many of the road, realty and fisheries management services on the "Addition" have been provided in the past by the Hoopa Valley Tribe. The Committee is, therefore, concerned about how the Bureau of Indian Affairs plans to address these needs, and directs the Secretary to work with the Yurok Tribe to develop proposed solutions to these and other related problems. The Committee is specifically interested in the feasibility and cost of constructing a road from U.S. Highway 101 to California Highway 96. It is also concerned that the Department of the Interior does not currently have adequate land records and surveys of the "Addition". The Committee, therefore, expects that the Department will conduct all necessary surveys to ascertain the legal status of such lands. It also expects the plan to address such things as the number of additional federal employees required to service the Yurok Tribe and placement of the Tribe's facilities construction needs on the BIA, IHS, and other federal agency construction priority lists. The Committee wishes to clarify, however, that the development of this plan should in no way delay the provision of services to the Yurok Tribe and/or the construction of federal and tribal facilities.

SECTION 11 - SPECIAL CONSIDERATIONS.

This Section was designated Section 10 in S. 2723, as introduced.

Subsection (a) provides that the 20-acre land assignment on the Hoopa Valley Reservation made by the BIA in 1947 to the Smokers family shall continue in effect and may pass by descent or devise to relatives of one-fourth

or more Indian blood of members domiciled on the assignment as of the date of enactment.

Subsection (b) provides that within 90 days after enactment, the Secretary shall conduct elections for the Resighini, Trinidad, and Big Lagoon, Rancherias concerning merger with the Yurok Tribe. If a majority of those voting approves, the Rancherias should fully merge their lands, assets and membership with the Yurok Tribe. The Secretary is to publish in the Federal Register notice of the effective date of any such merger. The Committee deleted reference to Blue Lake, Smith River, Elk Valley, and Tolowa Rancherias on the grounds that these rancherias are not historically of Yurok origin. A new subsection (c) was added to provide protection for existing property rights.

SECTION 12 - KLAMATH RIVER BASIN FISHERIES TASK FORCE

Subsection (a) amends the Act of October 27, 1986, establishing the Klamath River Basin Fisheries Task Force, by providing for a representative of the Yurok and of the Karuk Tribes on such task force. The Secretary is to appoint the first Yurok representatives who will serve until the Yurok Tribe is organized and appoints its own representative.

Subsection (b) provides that the term of the initial Yurok and Karuk members appointed shall be for that time remaining on the terms of existing task force members and, thereafter, as provided by the provisions of the 1986 Act.

SECTION 13 - TRIBAL TIMBER SALES PROCEEDS USE

Section 11 amends section 7 of the Act of June 25, 1910 (25 U. S. C. 407) by making clear that timber sales proceeds from Indian reservations shall be used only for the benefit of the tribe or tribes located on such reservations and their members.

In the *Short* case, the Circuit Court interpreted section 407, as applicable to the facts and circumstances of that case, in a manner which could cause mischief if applied to other Indian tribes and other facts and circumstances. The amendment simply makes clear that revenue from tribal timber resources are to be used solely for the tribes located on such reservation and, through such tribes, their members.

SECTION 14 - LIMITATIONS OF ACTIONS; WAIVER OF CLAIMS

A statute of limitations is very necessary to avoid uncertainty about the possible applicability of 28 U.S.C. §§ 2501 (six years), 2409a (12 years) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (no statute of limitation). The Committee finds that the periods provided in this section are reasonable under the circumstances. Further, the limitations here are rationally related to fulfillment of Congress' unique obligation to Indian tribes and individuals. E.g., *Littlewolf* v. *Hodel*, 681 F. Supp. 929 (D.D.C. 1988).

Subsection (a) provides that any claim challenging the constitutionality of this Act as a taking under the 5th Amendment of the Constitution shall be brought in the United States Claims Court under sections 1491 and 1505 of title 28, United States Code.

Subsection (b), paragraph (1), provides that any such suit by an individual, entity, or tribe other than the Hoopa Valley or Yurok Tribes, shall be barred unless brought within 210 days of the date of partition of the joint reservation or 120 days after the date for the election of options as established by section 6(a)(3), whichever is later.

Paragraph (2) provides that any such claim by the Hoopa Valley Tribe must be brought within 180 days of enactment or be barred.

Paragraph (3) provides that any such claim by the Yurok Tribe must be brought within 180 days of the date of

the general council meeting under section 9(c)(2)(A) or be barred.

Again, the Committee reiterates its conclusion that no individual or tribe has a vested, constitutionally protected right in the lands and resources of the joint reservation. The statute of limitations in this subsection are simply included to bring about some certainty and out of an abundance of caution.

Subsection (c) provides that the Secretary shall make a report to the Congress on any final judgment in any litigation brought pursuant to this section together with any recommendations deemed necessary. New language was added by the Committee to provide for a stay of payment of any judgment that might be rendered against the United States, in order to provide time for the Department to provide Congress with a report.

SECTION 15 - HEALTH ISSUES

A new Section 15 was added to provide for clean up of dump sites on the newly established Yurok Reservation. The Secretary of Health and Human Services and the Secretary of the Interior are directed to enter into a memorandum of understanding with Humboldt County for the clean up and maintenance of these sites. Costs are estimated at approximately $40,000 for the clean up and $8,000 per year for maintenance.

COST AND BUDGETARY CONSIDERATIONS

The authorization levels and purposes for which funds may be expended set forth in S. 2723 are identical to the companion bill, H.R. 4469, reported out of the House Committee on Interior and Insular Affairs on August 10, 1988. The cost estimate for H.R. 4469, and thus S. 2723, are set forth below:

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

SEPTEMBER 9, 1988.

1. Bill number: H.R. 4469.
2. Bill title: Hoopa-Yurok Settlement Act.
3. Bill status: As amended and ordered reported by the House Committee on Interior and Insular Affairs, August 10, 1988.
4. Bill purpose: This bill would, if certain conditions are met, partition specified joint Indian reservation lands in northern California into the Hoopa Valley Reservation and the Yurok Reservation. It would also establish the Hoopa-Yurok Settlement Fund, and require the Secretary of the Interior to deposit into it escrow funds and interest earnings from designated trust accounts. The bill would require the Secretary to make distributions from the fund into trust accounts for the Hoopa Valley and Yurok tribes, and to make payments to eligible individuals electing certain tribal membership options. The bill authorizes the appropriation of $10 million to be deposited into the Settlement Fund for the purpose of making lump-sum payments to such individuals.

The bill would also require the Secretary of the Interior to administer the partitioning of the lands and the two tribes. This responsibility would include specifying the reservation lands and boundaries, preparing an eligibility roll and final Settlement Roll, providing for the election of a settlement option by those on the Settlement Roll and establishing them as tribal members, organizing a general council meeting of the Yurok Tribe, and providing for the election of an Interim council for that tribe. The bill permits the Secretary to use up to $5 million of Bureau of Indian Affairs (BIA) funds to acquire lands or interest in lands for the Yurok Tribe or its members.

5. Estimated Cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1989	1990	1991	1992	1993
Estimated authorization level	10	(1)			
Estimated outlays	(1)	10			

[1] Less than $500,000

The costs of this bill fall within budget function 450.

Basis of Estimate

The estimated costs of this bill reflect the authorization and distribution of $10 million for lump-sum payments of $20,000 each to eligible individuals choosing not to become members of either the Hoopa Valley or Yurok Tribes. Based on information provided by the BIA, the number of individuals expected to choose this option is at least 500, the number that would exhaust $10 million authorization.

Additional lump-sum and other payments required under this bill would come out of the Settlement Fund, which would have a balance of more than $50 million. The Settlement Fund money is currently being held in escrow and, in the absence of legislation, would be available for distribution upon resolution of a pending court claims [sic]. The estimate assumes that the bill would not significantly affect the timing or amount of spending of the amounts currently held in escrow relative to current law.

The administrative task associated with partitioning the reservation and the tribes are estimated to result in additional costs of approximately $500,000 in the first two fiscal years after enactment. We estimate no additional costs for land acquisition, based on information provided by the

BIA that the agency would not exercise the authority provided in the bill for such activity. Other provisions of the bill are not expected to result in significant additional cost.

6. Estimated cost to State and local governments: None.

7. Estimated comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carol Cohen.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2723, as amended, will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following statements from the Department of the Interior and the Department of Justice at its hearing on September 14, 1988:

STATEMENT OF ROSS O. SWIMMER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman and members of the Committee. I am pleased to be here today to discuss S. 2723, a bill "To partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes."

We object to enactment of S. 2723 unless it is amended to meet our concerns, especially with regard to the

deletion of an unjustified Federal contribution of $15 million, we would recommend that the President veto the bill.

Since the 1950's there has been a dispute among the Indians of the Hoopa Valley Reservation in Northern California as to who is entitled to share in the timber proceeds from the "Square" portion of that Reservation. (The Square is in Hoopa Valley, and the "Extension" follows the Klamath River to the Pacific.) Following a 1958 opinion of the Solicitor's Office that the Hoopa Valley Tribe was entitled to receive all the timber income, individual Indians, now numbering some 3800 of Yurok and other tribal groups, brought suit in 1963 for damages for their exclusion from shares in the income (*Jessie Short, et al. v. United States*, No. 102-63, United States Claims Court). The Yurok Tribe has never organized itself as a political or corporate entity, and thus has no spokesmen or official representatives.

At the time the litigation was begun, the Square was treated as a separate reservation from the Extension. In 1973, the Court of Claims held that there was but a single reservation. Subsequently, the Court ruled that all the "Indians of the Reservation" are entitled to participate in per capita distributions of the income from the timber on the unallotted (tribal) lands of the Square. From 1974-1978 efforts were made to determine the identity of the "Indians of the Reservation" and to mediate a settlement.

In 1979, the Government moved to substitute the Yurok Tribe for the 3800 individual plaintiffs, and the Hoopa Valley Tribe, as intervenor, moved to dismiss the case. In 1981, the Court of Claims denied the motions and ruled that successful plaintiffs would be determined on standards similar to the standards for membership in the Hoopa Valley Tribe. The Federal Circuit Court of Appeals affirmed. The petitions for certiorari filed by the Hoopa Valley Tribe and 1200 of the plaintiffs, the third unsuccessful effort to obtain certiorari in the case, were denied by the Supreme Court on June 19, 1984.

In 1980 another suit was filed (*Lillian Blake Puzz, et al. v. United States et al.*, No. C-80-2908 TEH, U.S.D.C., N.D.

California) by six individuals claiming to be Indians of the Hoopa Valley Indian Reservation whose rights to participate in reservation administration and to benefit from the reservation's resources were allegedly denied by the Federal Government in violation of their constitutional rights to equal protection.

Plaintiffs' claims were initially premised on individual Indian ownership of the unallotted reservation resources, although they later also asserted that all "Indians of the Reservation" constituted one tribe, and that all individual Indians should have a vote in that tribe's government. The Government's position was that the reservation was created for Indian tribes, not individual Indians, and that the recognition of Indian tribes is a political question for determination by the Congress and the Executive Branch and such determinations are not reviewable by the courts.

On April 8, 1988, the court issued an order in which Judge Henderson agreed with the Government that the reservation was created for Indian tribes except that the Hoopa Valley Reservation was not created for a single tribe but for "all tribes which were living there and could be induced to live there." Order at p. 7. The court concluded that Federal recognition of the Hoopa Tribe did not give the tribe exclusive control over any reservation lands and resources.

The court also found that the individual plaintiffs have standing to litigate reservation management issues and that the 1864 statute authorizing the creation of the reservation imposed a trust responsibility on the U.S. Government extending to all the Indians of the Reservation.

Having addressed these issues the court ordered three specific actions:

1. The Federal defendants may lawfully allow the Hoopa Business Council (HBC) to participate in reservation administration, and the HBC may lawfully conduct business as a tribal body sovereign over its own members, and, as an advisory body, participate in reservation administration;

2. Federal defendants shall not dispense funds for any project or services that do not benefit all Indians of the reservation in a non-discriminatory manner. Federal defendants shall exercise supervisory power over reservation administration, resource management, and spending of reservation funds, to ensure that all Indians receive the use and benefits of the reservation on an equal basis. Specifically, Federal defendants shall not permit any reservation funds to be used for litigation among Indians or tribes of the reservation.

3. To fulfill the requirements of this Order, Federal defendants must develop and implement a process to receive and respond to the needs and views of non-Hoopa Valley tribal members as to the proper use of reservation resources and funds.

On June 7, 1988, we submitted to the court a plan of operation for the management of the Hoopa Valley Reservation resources, as required by the court's April 8, 1988 order. On September 2, 1988 the court denied plaintiffs' motion to strike the plan, although it emphasized that the issues raised in that motion would have to be addressed if this legislation is not enacted and the court is left with the task of approving a final long-term plan for the management of the reservation.

Obviously, the District Court's orders are changing the management of the reservation and its resources. However, we do not believe that they provide the appropriate vehicle for a satisfactory permanent resolution to all the problems on the Hoopa Valley Indian Reservation. We believe that partitioning the communal reservation and encouraging the Yuroks to organize as a tribe would lead to more satisfactory results.

Now I would like to address our major concerns regarding S. 2723. I have attached our technical concerns to my written statement.

S. 2723 partitions the Hoopa Valley Reservation only if the Hoopa Valley tribe passes a resolution waiving any claims they may have against the United States arising out of

the provisions of the Act. The resolution must be presented to the Secretary within 60 days of enactment of the Act. The Secretary then publishes the resolution in the Federal Register and the existing communal reservation becomes two reservations. The "square" would become the Hoopa Valley Reservation and the "extension" would become the Yurok Reservation. Additional forest service land would be added to the Yurok Reservation and an authorization of $5 million would be provided for the purchase of additional land for the Yurok Reservation.

We do not believe that expanding the reservation is necessary at this time and strongly oppose the addition of Federal money for this purpose. Currently, there are approximately 400 Yuroks living on the "Extension" which includes 5,373.9 acres (including tribal land and allotments). We recommend that this provision be deleted.

Upon enactment of the act, the existing $50 million communal escrow account is to become the basis of a settlement fund. An additional $10 million is authorized to be appropriated to add to the fund. We do not believe the settlement fund should be established until the communal reservation is partitioned. Further, we believe that the bill should not become effective (except for section 12) until the Hoopa Valley Tribe adopts and sends to the Secretary, the resolution called for in section 2(a).

We strongly oppose the addition of Federal money to this fund and believe that the distribution of the fund should be used for making the payments under section 6 and giving any remaining funds to the Yurok Tribe. The partition of the communal reservation and the commu[n]al escrow account should not require the addition of Federal funds. If the amount in the escrow fund is not sufficient, we believe the per capita amounts available to individuals under the bill should be changed so that the escrow funds cover those payments. We believe the bill should be amended to specify that if adequate funds are not available in the Settlement fund to make the payments, such payments shall be pro-rated accordingly. Any funds remaining in the Settlement Fund

after all payments have been made or provided for, should be held in trust for the Yurok Tribe.

The Secretary is to prepare a settlement roll of all persons who can meet the criteria established by the Federal court in the *Short* case for qualification as an "Indian of the Reservation". The Secretary is to provide each eligible person the opportunity to choose one of the following options: 1) become a member of the Hoopa Valley Tribe (if appropriate criteria are met); 2) become a member of the Yurok Tribe and receive a $3000 payment; or 3) elect to receive a payment of $20,000 and give up all rights to the reservation and all rights to membership in the Yurok Tribe.

Parents and guardians of children on the Settlement Roll under the age of 18 would choose an option for their child.

Although we do not object to the provision allowing parents or guardians making the choice for minor children, we believe that the children's payments should be held in trust until they reach age 18. The Settlement Fund could remain in effect and draw interest until each minor reaches age 18 and receives their payments.

We further recommend that the Settlement Roll be established as of the date of the partition of the communal reservation rather than as of the date of enactment of the Act. This could assure that the roll would include all persons having an appropriate interest at the time of the partition. Anyone born after the partition would of course, not have a interest in the previous single communal reservation.

Section 9 provides for the organization of the Yurok Tribe under the Indian Reorganization Act. Within 45 days of the official notice the Secretary shall convene a general council meeting of the eligible voters of the Yurok Tribe. The General Council would vote on the adoption of a resolution waiving any claim the Tribe may have against the United States arising out of the provisions of this Act and to nominate candidates for an interim council. The general council would elect an Interim Council to represent the tribe until a constitution and tribal council are in place, or for 2

years, which ever is the shorter period. The Interim Council would appoint a drafting committee to draft a tribal constitution and request the Secretary to authorize an election to vote on the constitution.

The time required for the Secretary to provide notice, call general council meetings, and hold elections is unreasonable. The Bureau would not be able to meet such requirements. Amended requirements are included in our technical amendments attached to my written statement.

We would also commend [sic] that the tribe be required to have a constitution and an elected tribal council before they enter into contracts or receive grants from the Federal Government. Under the bill the Interim Council could enter into a contract and then after two years the council would be dissolved. We do not believe this is either good management or fair to the tribal members who m[a]y receive services under the contract.

Section 13 provides for statute of limitations for any claim brought against the United States challenging the partition of the communal reservation under this act. We defer to the Department of Justice on these provision[s].

Mr. Chairman, we urge the Committee to amend the bill to meet our concerns, particularly with respect to the appropriation authorization of $15 million. I have attached a number of technical concerns to my written statement.

This concludes my prepared statement. I will be pleased to answer any questions the Committee may have.

RECOMMENDED AMENDMENTS TO S. 2723

Section 1(b)(7) defines Karuk Tribe as organized after a special election conducted by the United States Department of the Interior, Bureau of Indian Affairs. The Bureau of Indian Affairs did not hold a special election. We recommend the following amendment:

Section 1(b)(7) line 16 (page 3) after "constitution" delete "after a special election conducted by the United States

Department of the Interior, Bureau of Indian Affairs" and change "April 18" to "Aprill [sic] 6".

Section 2(c)(3)(A) provides authority for the Secretary to take additional land into trust status for the Yurok Tribe. We recommend that the provision clarify that the land would be part of the Yurok Reservation. We recommend the following amendment:

Section 2(c)(3)(A) line 8 (page 7) add at the end "and that such lands may be declared to be part of the Yurok Reservation".

Section 4(a) establishes a Settlement Fund upon enactment of this act. We believe the fund should be established upon the partition of the reservation. We recommend the following amendment.

Section 4(a) line 8 (page 9) delete "enactment of this Act" and insert "the partition of the Hoopa Valley Reservation under section 2 of this act".

Section 4(a)(2) permits the Hoopa Valley Tribe to use up to $3.5 million annually out of the income or principal of the Settlement Fund for tribal, non-per capita purposes. We believe the Yurok Tribe should also be able to draw this account. We recommend that Sec. 4(a)(2) line 12 (page 9) be amended as follows:

> "(2) Until the distribution is made to the Hoopa Valley and Yurok Tribes under subsection (c), the Secretary may distribute to both tribes an amount not to exceed income and interest earned less 10 per cent for the current operating year out of the Settlement Fund. These funds may be used for tribal purposes and may not be distributed as per capita payments."

Section 4(b) on page 9, line 23 should be amended by striking out "pending" and inserting in lieu thereof "pending payments under section 6 and".

Section 4(c) line 3 (page 10) and 4(d) line 13 refer to the wrong paragraph. Section 6(a)(3) should be changed to "6(a)(4)".

Subsections (c), (d), and (e) of section 4 on page 10, line 1 through page 11, line 6 should be deleted.

Section 5 provides for the Secretary to establish a Settlement Roll of eligible persons living on the date of enactment of this Act. We recommend that the roll be established as of the date of the partition of the reservation to avoid any possible problems regarding the status of a person born between the time of enactment of the Act and the partitioning of the reservation. We also recommend that the Secretary be given more time to complete the necessary procedures for establishing the roll. The following amendments are recommended:

Section 5(a)(A) line 20 (page 11) change "of enactment of this Act" to "of the partition under section 6(a)".

Section 5(b) line 24 (page 11) change "thirty" to "one hundred and twenty".

Section 5(d) line 22 (page 11) change "one hundred and eighty days" to "two hundred and forty days".

Section 6 requires the Secretary to notify all eligible persons of the options available to them under the act. We believe it should be clear that each individual must choose one option. We also recommend that notice be given by certified mail rather than by registered mail. We recommend the following amendments:

Section 6(a) line 23 (page 13) change "registered" to "certified".

Section 6(a) line 1 (page 14) after "elect" insert "one of".

Section 6(a)(3) (page 14) should be amended to designate paragraph "(3)" as "(3)(A)" and add a new subparagraph "(B)" as follows:

> "(B) The funds entitled to such minors shall be held in trust by the Secretary until the minor reaches age 18. The Secretary shall notify and provide payment to such persons including all interest accrued."

Section 6(b) line 3 (page 15) "March 21" should be "March 31".

Section 6(b)(3) requires the Secretary to assign a blood quantum to persons electing to become enrolled members of the Hoopa Valley Tribe. We recommend the following clarifying amendment:

Section 6(b)(3) line 23 (page 15) should be amended to read: "The Secretary shall determine the quantum of "Indian blood" or "Hoopa Indian blood", if any, of each person enrolled in the Hoopa Valley Tribe under this subsection pursuant to the criteria established in the March 31, 1982 decision of the U.S. Court of Claims in the case of *Jessie Short et al. v. United States*, (Cl. Ct. No. 102-63)".

Section 6(c)(2) line 17 (page 16) should be amended for clarity and consistency with subsection (b)(3). After "shall" delete "assign each person that quantum of "Indian blood" as may be determined" and insert "determine the quantum of "Indian blood", if any,".

Section 6(c)(3) lines 22 and 23 (page 16) should be amended to read as follows:

"(c) The Secretary shall pay (subject to section 7 of the Act of October 19, 1973, as amended (25 U.S.C. 1407)) to each person".

Section 9 provides for a procedure for the organization of the Yurok Tribe. We believe an interim council should be elected for the primary purpose of drafting a constitution. The Secretary should provide services until the tribe has a constitution and an officially elected tribal council. We recommend the following amendments:

Section 9(c) line 10 (page 19) change "30" to "60".

Section 9(c)(3) line 12 (page 20) change "45" to "60".

Section 9(d)(2) line 6 (page 21) should be amended as follows:

> "(2) The Interim Council shall represent the tribe to assist the Secretary in determining the needs and appropriate programs for the tribe. The Council shall be responsible for determining appropriate use of the funds available to the tribe under section 4(a) of this act."
>
> Delete paragraph "(3)" and renumber "(4)" as "(3)".

Renumber paragraph "(5)" as "(4)" and on line 1 (page 22) delete the words "or at the end of two years after such installation, whichever occurs first".

Section 10 allows the merger of existing Rancherias with the Yurok Tribe. There is no Tolowa Rancheria so that reference should be deleted. We also recommend that since the names listed in this section are names of Rancherias and not names of Tribes that the section be amended to reflect that difference.

Section 10(b) line 23 (page 22) should be amended to add "any of the following Rancherias at" after "members of". Delete "the" after the word "of".

Section 10(b) line 24 (page 23) after "Elk Valley" delete "or Tolowa Rancherias".

Section 11 provides for the addition of a member of the Karok and Yurok Tribes to the Klamath River Basin Fisheries Task Force.

The Secretary is to appoint the member for the Yurok Tribe until the Tribe is recognized. Since the tribe is already Federally recognized we recommend this provision be changed to refer to the tribe's organization.

Section 11(b) line 23 (page 23) delete "established and federally recognized" and insert "organized".

Section 11(b) line 2 (page 24) change "recognized" to "organized".

Add a new section 14 at the end of the bill as follows:

"Sec. 14. This Act (except sections 2(a) and 12) shall be effective upon partitioning of the reservation as provided in section 2(a). Sections 2(a) and 12 shall be effective upon enactment."

STATEMENT OF RODNEY R. PARKER, ASSOCIATE DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, on behalf of the Department of Justice, I am pleased to have this opportunity to present our views on S. 2723, legislation to

partition reservation lands between the Hoopa Valley Tribe and the Yurok Indians, as introduced by Senator Cranston. This bill, which is identical to the amended version of H.R. 4469 introduced by Congressman Bosco, satisfies our litigation concerns. However, because of budgetary and other policy concerns, we defer to the Department of the Interior for the Administration's position on the bill.

In 1876, a 12-mile square tract of land in Northern California (the Square), occupied mainly by Hoopa Indians, was set aside by President Grant as the Hoopa Valley Indian Reservation. In 1891, President Harrison extended the boundaries of the Reservation to include the adjoining 1-mile wide strip of land on either side of the Klamath River (the Addition or Extension) which was occupied mostly by Yurok Indians.

Beginning in the 1950's, the Hoopa Valley Tribe, a federally recognized and organized tribe, began receiving proceeds from the harvesting of timber from the Square. Some of the proceeds from the timber harvests were distributed on a per capita basis to individual members of the Hoopa Valley Tribe. This prompted suits by other Indians who were not members of the tribe and thus did not receive per capita payments. *Short v. United States*, No. 102-63, Cl.Ct.; *Ackley v. United States*, No. 460-78, Cl.Ct.; *Aanstadt v. United States*, No. 146-85L, Cl.Ct.; *Giffen v. United States*, No. 746-85L, Cl.Ct.

In these cases, the United States Claims Court held, contrary to the government's position, that the Square and the Extension were a single reservation and that all Indians of the Reservation were entitled to share in a money judgment based on past distributions of individualized monies, i.e. the per capita payments. Since the initial ruling in 1973, efforts have been made to identify the qualified plaintiffs, to settle the litigation and to mediate the dispute which is focused on the conflicting positions of the organized Hoopa Valley Tribe and the federally recognized but not organized Yurok Tribe.

S. 2723 would provide for the partition of the Hoopa Valley reservation into two separate reservations, to be held

in trust by the United States for the Hoopa Valley Tribe and the Yurok Tribe, respectively. The bill also provides for the establishment and distribution of a Settlement Fund for eligible individuals.

The Department of Justice has worked with Congressman Bosco's staff to draft legislation that satisfied our litigation concerns. S. 2723, which is identical to the amended version of H.R. 4469, would, in general, satisfy our litigation concerns.

We have, however, two remaining concerns with the bill. Our first concern is clarification that no Fifth Amendment taking is intended by the sections providing for the contribution of tribal monies to the Settlement Fund. The bill already provides for a waiver of claims by the Hoopa Tribe and, under certain circumstances, the Yurok Tribe. While we understand the waiver language as already evidencing tribal consent, we think a provision requiring express tribal consent could provide a clearer acknowledgment by the tribal government that no taking has occurred. We therefore suggest that section 2(a)(2)(A) be changed to read as follows:

> (2)(A) The partition of the joint reservation as provided in this subsection shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:
>
> > (i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and
> >
> > *(ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.*

We likewise suggest that section 9(c)(2)(A) be changed to read as follows:

(A) the adoption of a resolution, by a vote of not less than two-thirds of the voters present and voting:

(i) waiving any claim the Yurok Tribe may have against the United States arising out of the provision of this Act, and

(B) [sic] (ii) affirming tribal consent to the contribution of Yurok Escrow monies to the Settlement Fund, and for their use as payments to the Hoopa Tribe, and to individual Hoopa members, as provided in this Act.

Our second concern involves section 13(c)(2) of the bill, which provides that, in the event of a judgment against the United States based on a Fifth Amendment taking, the Secretary of the Interior shall submit a report to Congress recommending possible Congressional modifications to the bill. Pursuant to this section, Congress could change the nature of the act that constituted a taking, and thus make payment for a permanent taking by the United States unnecessary. In order to ensure that payment is not made in the event that Congress takes action to make the payment unnecessary, we suggest that the following provisions be added to section 13(c)(2) of the Act:

> Notwithstanding the provisions of 28 U.S.C. 2517, any judgment entered against the United States shall not be paid for 180 days after the entry of judgment; and, if the Secretary of the Interior submits a report to Congress pursuant to this section, then payment shall be made no earlier than 120 days after submission of the report.

The bill's remaining provisions largely involve budget and policy matters and we defer to the Department of the Interior on them. I would be pleased to answer any questions you might have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

ACT OF JUNE 25, 1910, AS AMENDED

* * * *

[Sec. 7. The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to the Act of February 14, 1920, as amended (25 U.S.C. 413), shall be used for the benefit of Indians who are members of the tribe or tribes concerned in such manner as he may direct.]

Sec. 7. Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), the proceeds of the sale shall be used -

(1) as determined by the governing bodies of the tribes concerned and approved by the Secretary or

(2) in the absense [sic] of such a governing body, as determined by the Secretary for the tribe concerned.

* * * *

ACT OF OCTOBER 27, 1986
(100 Stat. 3086; 16 U. S. C. 460ss)

* * * *

Sec. 4. Klamath River Basin Fisheries Task Force

* * * *

(c) Membership and appointment. The Task Force is composed of [12] *14* members as follows:

* * * *

(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the tribe.

(12) A representative of the Yurok Tribe, who shall be appointed by the Secretary until such time as the Yurok Tribe is established and Federally recognized, upon which time the Yurok Tribe shall appoint such representative beginning with the first appointment ordinarily occurring after the Yurok Tribe is recognized. History Aboriginal Tribers [sic] *and Lands of Northern California.*

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No. 92-1541

(3)

Supreme Court, U.S.
FILED
JUN 01 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

LILLIAN MCCOVEY SHERMOEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court correctly dismissed this action seeking a declaration that the Hoopa-Yurok Settlement Act, 25 U.S.C. 1300i *et seq.*, is unconstitutional, on the ground that the Hoopa and Yurok Tribes were indispensable parties under Fed. R. Civ. P. 19.

2. Whether the lower courts erred in concluding that principles of sovereign immunity prohibited joinder of the councils and council members of the two absent Tribes as defendants.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1541

LILLIAN MCCOVEY SHERMOEN, ET AL., PETITIONERS

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UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 982 F.2d 1312. The opinion of the district court (Pet. App. 17a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1992. The petition for a writ of certiorari was filed on March 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents an action by 70 individual Indians and a small community of Indians claiming that Congress violated the Constitution when it enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. 1300i *et seq.* (1988)), to resolve a long-standing dispute between the Hoopa Valley Tribe and a group of Yurok Indians. The district court dismissed the action based on its view that the Hoopa Valley and Yurok Tribes were indispensable parties. Pet. App. 17a-28a. The court of appeals affirmed. Pet. App. 1a-15a.

1. In 1853, Congress authorized the President "to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." Act of Mar. 3, 1853, ch. 104, §1, 10 Stat. 238. Acting under that statute (as amended by the Act of Mar. 3, 1855, ch. 204, § 1, 10 Stat. 699), President Pierce issued an Executive Order on November 16, 1855, which created a reservation consisting of a 25,000-acre "strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River." See 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 817 (2d ed. 1904) [hereinafter Kappler]. That reservation generally was inhabited by Yurok Indians. See *Short* v. *United States*, 486 F.2d 561, 562 (Ct. Cl. 1973) (*Short I*), cert. denied, 416 U.S. 961 (1974); S. Rep. No. 564, 100th Cong., 2d Sess. 3-4 (1988).

Because the area experienced continuing unrest arising out of the refusal of many of the Indians in the area to move onto the Klamath River Reservation, Congress passed another statute in 1864, authorizing

the President to "set apart * * * at his discretion, not exceeding four tracts of land, within the limits of [California], to be retained by the United States for the purposes of Indian reservations." Act of Apr. 8, 1864, ch. 48, § 2, 13 Stat. 40. Acting under the 1864 Act, President Grant issued a June 23, 1876, Executive Order setting aside a reservation consisting of a 12-mile square tract of land on the last reach of the Trinity River before it joins the Klamath River. Most of the inhabitants of that area—known as the Square—were Hoopa Indians. See 1 Kappler, *supra*, at 815; *Short I*, 486 F.2d at 562; S. Rep. No. 564, *supra*, at 5-6.

Because the relation between the five reservations authorized by the 1853 Act (under which the Klamath River Reservation was created) and the four reservations authorized by the 1864 Act (under which the Hoopa Valley Reservation was created) was unclear, considerable doubt arose as to the continuing existence of the Klamath River Reservation. After a federal district court held in 1888 that the area within the Klamath River Reservation was not Indian country, President Harrison responded by issuing an Executive Order on October 16, 1891, which expanded the Hoopa Valley Reservation to include the tract formerly designated as the Klamath River Reservation (referred to now as the Addition), together with a strip connecting the two tracts of land. See Pet. App. 5a; 1 Kappler, *supra*, at 815; S. Rep. No. 564, *supra*, at 6-7. Although the position of individual officials of the Bureau of Indian Affairs (BIA) in the Department of the Interior may have varied somewhat over the years, the BIA consistently took the view after 1952 that the Square was in effect a separate reservation

held for the Hoopa Indians. Accordingly, the considerable revenues generated by the sale of timber located on the Square were used solely for the benefit of the Hoopa Indians. See S. Rep. No. 564, *supra*, at 7-8.

2. In 1963, a group of Indians identifying themselves as Yurok Indians[1] filed an action in the Court of Claims against the United States (*Short* v. *United States*, Ct. Cl. No. 102-63), claiming that as residents of the Hoopa Valley Reservation they were entitled to a share of the revenues from the Square, even if they were not Hoopa Indians and did not reside on the Square. See *Short I*, 486 F.2d at 562. In 1973, the Court of Claims ruled in favor of the *Short* plaintiffs, who by then numbered more than 3,300. *Id.* at 562, 565-568. After that decision, the *Short* litigation continued for many years as the parties sought to resolve various remaining issues, including a determination as to which plaintiffs qualified as "Indians of the Reservation" entitled to a share of the timber revenues that had been generated on the Square. See *Short* v. *United States*, 661 F.2d 150 (Ct. Cl. 1981) (en banc) (*Short II*), cert. denied, 455 U.S. 1034 (1982). Issues relating to the correct amount of damages owing to the *Short* plaintiffs are still pending in the Court of Federal Claims.

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[1] The *Short* plaintiffs are descendants of Yurok Indians who inhabited the area of the Addition aboriginally and since its addition to the Reservation in 1891. See *Short I*, 486 F.2d at 562. The United States has recognized the existence of a Yurok Tribe, based on historic federal dealings with the Indians from whom the *Short* plaintiffs are descended. The Yuroks have not, however, organized into a political or corporate body. See S. Rep. No. 564, *supra*, at 33 (statement of Ross O. Swimmer, Assistant Secretary for Indian Affairs).

In 1980, a group of the *Short* plaintiffs filed another suit against the United States, seeking to enjoin the Department of the Interior from continuing to recognize the Hoopa Valley Tribe as the exclusive governing authority over the trust lands and resources of the Square. *Puzz* v. *United States*, No. C-80-2908 (N.D. Cal.). The district court in *Puzz* generally accepted the reasoning of the Court of Claims in *Short I* and held that no single Tribe had exclusive authority over any part of the Reservation. Accordingly, the court ordered the BIA to assume management of the entire Reservation, limited the Hoopa Valley Tribal Council to an advisory role in Reservation management decisions, and ordered the BIA to develop a process by which the individual Yurok Indians could have input into Reservation management decisions. See S. Rep. No. 564, *supra*, at 9, 14, 33-34.

3. In response to the "confusion and uncertainty * * * existing on the Hoopa Valley Reservation" after the decisions in *Short* and *Puzz*, S. Rep. No. 564, *supra*, at 13, Congress enacted the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988).[2] The Act conditionally provided for the old Hoopa Valley Reservation to be partitioned into two separate Reservations. 25 U.S.C. 1300i-1. One, corresponding to the Square, retains the title "Hoopa Valley Indian Reservation" and is to be held in trust

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[2] The 1988 Act was amended in minor respects by the Act of Oct. 23, 1989, Pub. L. No. 101-121, § 315, 103 Stat. 744, and the Act of May 24, 1990, Pub. L. No. 101-301, § 9, 104 Stat. 210-211. For convenience, references to the Act are to the 1988 Act, as amended, which is codified at 25 U.S.C. 1300i *et seq.* (1988 & Supp. III 1991).

by the United States exclusively for the benefit of the Hoopa Valley Tribe. 25 U.S.C. 1300i-1(b). The other, designated the "Yurok Reservation," generally corresponds to the "Addition" and is set aside exclusively for the benefit of the Yurok Tribe. 25 U.S.C. 1300i-1(c).[3] Under the Act, the partitioning would take effect only if the Hoopa Valley Tribe promptly waived any claims it might make against the United States under the Act. 25 U.S.C. 1300i-1(a)(2)(A). When that waiver was forthcoming, see 53 Fed. Reg. 49,361 (1988), the Hoopa Valley Tribe became the exclusive local governing authority on the Reservation; in 25 U.S.C. 1300i-7, Congress ratified the governing documents of the Hoopa Valley Tribe.

Because the Yurok Tribe had not previously organized, the Act provides a more complicated process for implementation of the Act on the Yurok Reservation. That process began with appointment by the Secretary of the Transition Team, which was authorized to counsel potential tribal members about the Act and set the stage for further organization. 25 U.S.C. 1300i-8(a)(3) (Supp. III 1991). The Act then provided for creation of an Interim Council, elected by those individuals included on a roll established by the Secretary who elected under the Act to be compensated as members of the Yurok Tribe. 25

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[3] The Act excludes from the Yurok Reservation a small portion of the Addition called the Resighini Rancheria, which is inhabited by petitioner Coast Indian Community of Yurok Indians. 25 U.S.C. 1300i-1(c)(1), 1300i-10(b). The Act authorized the Coast Indian Community to merge its government and territory with those of the Yurok Tribe by a vote to be held within 90 days of the Act's passage. 25 U.S.C. 1300i-10(b). The Department of the Interior has informed us that the Coast Indian Community did not exercise that option.

U.S.C. 1300i-8(b), (c); see pages 7-8, *infra*. The Interim Council is obligated to prepare a tribal constitution for approval by the Secretary and by the vote of tribal members, 25 U.S.C. 1300i-8(d)(4), and is empowered to adopt on behalf of the Yurok Tribe a waiver of claims against the United States arising out of the Act, 25 U.S.C. 1300i-8(d)(2)(i). When the Interim Council adopts such a waiver, the Yurok Tribe's status as an Indian tribe will be ratified and confirmed. 25 U.S.C. 1300i-8(a)(1). The Interim Council will be dissolved when a permanent governing body is elected pursuant to the constitution, or at the end of two years after installation of the Interim Council, whichever occurs first. 25 U.S.C. 1300i-8(d)(5).[4]

The Act also creates a Settlement Fund totalling approximately $75 million, made up of about $65 million in revenues derived from the trust lands of the pre-Act Hoopa Valley Reservation (primarily timber revenues from the Square) that have been held in various escrow accounts by the Secretary, together with an additional appropriation of $10 million. 25 U.S.C. 1300i-3; S. Rep. No. 564, *supra*, at 19-21.[5] The actual distribution of the Settlement Fund depends on the number of individuals listed on a Settlement Roll prepared by the Secretary. 25 U.S.C. 1300i-4 (1988 & Supp. III 1991). Those individuals may select from

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[4] The Department of the Interior has informed us that the Interim Council has been elected, but that the Council has not yet adopted a waiver of claims or presented a constitution to the Secretary for approval.

[5] The Settlement Fund does not include the funds at issue in the *Short* litigation in the Court of Federal Claims; the Act preserves the right of the *Short* plaintiffs to litigate that case to judgment. 25 U.S.C. 1300i-2.

among three options available under the Act. First, individuals eligible for membership in the Hoopa Valley Tribe may elect to become members of the Hoopa Valley Tribe; in that event, they will share only in a portion of the Fund distributed to the Hoopa Valley Tribe itself, to be determined by comparing the size of the Hoopa Valley Tribe to the whole number of Indians eligible for distributions under the Act. 25 U.S.C. 1300i-3(c), 1300i-5(b). Second, individuals on the Settlement Roll may elect to become members of the Yurok Tribe, in which case they will receive between $5,000 and $7,500, depending on their age. 25 U.S.C. 1300i-3(d), 1300i-5(c). Third, individuals on the Settlement Roll may elect membership in neither Tribe, in which case they will receive $15,000. 25 U.S.C. 1300i-5(d). By making an election to receive payment under any of the three options, an individual waives all right and interest in the reservation or other property of the Tribe (or Tribes) he has chosen not to join. 25 U.S.C. 1300i-5(b)(4), (c)(4) and (d)(3). Any remaining funds are then to be disbursed to the Yurok Tribe. 25 U.S.C. 1300i-6(a).[6]

Finally, the Act provides that "[a]ny claim challenging the partition of the joint reservation * * * as having effected a taking under the fifth amendment of the United States Constitution or as otherwise

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[6] The Secretary completed the Settlement Roll, determining which individuals were eligible for distributions, in the spring of 1991. 56 Fed. Reg. 12,062 (1991). The elections have been made and payments have been made to the Hoopa Valley Tribe and to the individuals who selected membership in the Yurok Tribe or in neither Tribe. The Secretary has not yet made the disbursement of the remaining funds to the Yurok Tribe because it has not yet adopted the requisite waiver of claims against the United States. See p. 7 & note 4, *supra*.

having provided inadequate compensation shall be brought * * * in the United States Claims Court." 25 U.S.C. 1300i-11(a) (Supp. III 1991). As petitioners note (Pet. 6 n.4), claims for compensation have been filed in the Court of Federal Claims (formerly the Claims Court) by the Yurok Tribe, which sued on behalf of itself and its members, *Yurok Tribe* v. *United States*, No. 92-173L, and by individual plaintiffs, including the individual petitioners in this case, *Ammon* v. *United States*, No. 91-1432L.

4. In 1990, petitioners filed this action in the United States District Court for the Northern District of California. They contended that the Act unconstitutionally infringed their right freely to associate in matters of political concern, violated their rights under the Due Process and Just Compensation Clauses and the equal protection guarantee of the Fifth Amendment, and exceeded constitutional limits on Congress's power to regulate Indian affairs. See Pet. App. 6a. Petitioners sought injunctive relief preventing the Secretary from implementing the Act and from treating the former Reservation as other than a single, unified reservation. Four individual members of the Hoopa Valley Tribal Council intervened and filed an answer. See *id.* at 7a. In 1991, the district court dismissed the action with prejudice, concluding that the Hoopa Valley and Yurok Tribes were indispensable parties under Federal Rule of Civil Procedure 19(b). Pet. App. 17a-28a.

Petitioners subsequently sought leave to file a second amended complaint naming the Yurok Tribe, the Yurok Interim Council, and all eight members of the Hoopa Valley Tribal Council as defendants. The court denied that motion on July 10, 1991 (Pet. App.

29a-31a), explaining that the "whole purpose of the lawsuit appears to be to invalidate the Hoopa-Yurok Settlement Act, and this just isn't the way to go about it." *Id.* at 30a.

5. The court of appeals affirmed. Pet. App. 1a-15a. The court first concluded that the Tribes were "necessary" parties to the suit because they have a "legally protected interest in the outcome of this action." *Id.* at 8a-9a. The court rejected petitioners' argument that the Tribes' interests would be represented adequately by the United States, noting that conflicts of interest could arise from the United States' status as trustee for all the various Indians in the controversy. *Id.* at 9a-10a. The court also rejected the notion that four members of the Hoopa Valley Tribal Council who had intervened could adequately represent either Tribe. The Court noted that their interests are entirely adverse to those of the Yurok Tribe, and that their interests differed from those of the Hoopa Valley Tribe because the Act "affects the rights of the intervenors as individuals." *Id.* at 10a-11a.

The court of appeals then concluded that the absent Tribes were indispensable parties, requiring dismissal of the complaint under Rule 19(b). The court explained that the potential prejudice to the absent Tribes, including threats to their legal entitlements under the Act and to their sovereignty, outweighed the prejudice to petitioners from dismissal. Pet. App. 11a-12a.

Finally, the court affirmed the denial of petitioners' motion to amend their complaint to join the officers of the Hoopa Valley Tribal Council as defendants. Pet. App. 12a-15a. The court explained that the district

court's ruling on that point was correct because even if the individuals had been joined, the sovereign immunity of the Tribe would have required dismissal. *Id.* at 13a. Relying on this Court's decision in *Dugan* v. *Rank*, 372 U.S. 609 (1963), the court of appeals concluded that this is an instance in which a suit for injunctive relief against individual officers may not proceed, because the suit in effect is one against the Tribe themselves, see Pet. App. 13a (quoting *Dugan*, 372 U.S. at 620), inasmuch as the relief requested would "require affirmative action by the sovereign or the disposition of unquestionably sovereign property," Pet. App. 14a (quoting *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)).

ARGUMENT

1. Petitioners contend (Pet. 8-9, 14-19) that the lower courts erred in concluding that the action could not proceed in the absence of the Tribes under Rule 19, Fed. R. Civ. P. Although petitioners argue (Pet. 9) that the decision below constitutes a sweeping ruling that generally would bar judicial review of statutes that "only marginally * * * benefit a tribe," the opinion of the court of appeals makes clear that its ruling rests on an analysis of the vital interests actually at stake for the Tribes in this particular case. As the Court explained in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), "[w]hether a person is indispensable * * * can only be determined in the context of particular litigation," and that "decision must be made on the basis of practical considerations," because "[t]here is no prescribed formula for determining in every case whether a person * * * is an indispensable party." *Id.*

at 117-118 & nn. 12, 14 (internal quotation marks omitted). The resolution of that fact-specific question in this case does not raise an issue of general interest warranting review by this Court. In any event, the lower courts correctly determined that the Tribes were both "indispensable" parties under Rule 19(b).

a. Petitioners do not seriously dispute the lower courts' conclusion that the Tribes were necessary parties under Rule 19(a)(2)(i) because each of them "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." The Tribes' most fundamental interests are subject to complete divestment in this litigation challenging the Act. For example, the Act grants the Yurok Tribe authority to organize and provides for express congressional confirmation and ratification once organization is complete; as for the Hoopa Valley Tribe, the Act resolves the uncertainty created by *Short* and *Puzz* by granting to the Hoopa Valley Tribe (as it does to the Yurok Tribe) the exclusive beneficial ownership of a clearly defined territory and the exclusive sovereign authority to govern that territory. As discussed above, the Act also creates a $75 million Settlement Fund, a majority of which the Act allocates to the two Tribes—and $25 million of which already has been disbursed to the Hoopa Valley Tribe. The Act also provides for the transfer to the United States in trust for the Yurok Tribe of all National Forest lands within the boundaries of the newly formed Yurok Reservation, 25 U.S.C. 1300i-1(c)(2)(A), and authorizes the appropriation of $5 million for the acquisition of additional

reservation lands for the Yurok Tribe, 25 U.S.C. 1300i-1(c)(3)(B). This suit—which seeks to invalidate the Act and return the situation to the status quo existing before the Act's passage—unquestionably has the potential to impair those vital interests.

As several courts of appeals have explained in the Indian context, when a party deemed to be "necessary" under Rule 19(a) is immune from suit, "there is very little room for balancing of other factors." *Enterprise Management Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989); see *Fluent* v. *Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir.) (very little room for balancing when dismissal "turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent") (internal quotation marks omitted), cert. denied, 112 S. Ct. 74 (1991); *Wichita and Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986); 3A James Wm. Moore and Jo Desha Lucas, *Moore's Federal Practice* ¶ 19.15, at 19-266 n.6 (2d ed. 1993). Accordingly, given the particularly grave interests at stake for the Tribes, it would have been inappropriate for the lower courts to proceed absent the most weighty countervailing considerations. Because the arguments advanced by petitioners are not sufficient to overcome the Tribes' interests in participating in a determination of their own destiny, the lower courts correctly dismissed this suit.

In particular, we note that petitioners err in suggesting (Pet. 9) that the decision of the court of appeals leaves them entirely without judicial recourse. As the district court noted, the Act itself provides an important alternative remedy in the form

of an action in the Court of Federal Claims for monetary relief for an alleged taking of petitioners' property. Pet. App. 26a n.4 (citing 25 U.S.C. 1300i-11(a) (Supp. III 1991)); see *Heller, Ehrman, White & MacAuliffe* v. *Babbitt*, Nos. 92-5003 & 92-5004 (D.C. Cir. May 18, 1993), slip op. 2-3 ("The [Court of Federal Claims] has exclusive jurisdiction over all suits challenging the distribution of money and property under * * * [the Hoopa-Yurok Settlement Act]. [A]n eager litigant may not circumvent a congressional grant of exclusive jurisdiction to the [Court of Federal Claims] * * * by simply converting the suit into one for injunctive relief.").

The Act thus fully protects petitioners' core personal interests by preserving petitioners' ability to vindicate whatever property right they may have in a suit for compensation, irrespective of the absence of the Tribes as parties to such a suit. The other interests asserted by petitioners simply boil down to their disagreement with Congress's chosen method of bringing about a prospective resolution of the complex and long-standing problems on the Hoopa Valley Reservation by partitioning that Reservation according to its historical use, providing for separate tribal governments, and according eligible Indians in the position of the individual petitioners in this case an option to cast their lot with one Tribe or the other—or neither. Given Congress's plenary power over Indian affairs, including recognition of tribal governments (see *Baker* v. *Carr*, 369 U.S. 186, 215-216 (1962)) and questions of tribal membership for federal purposes (see *Delaware Tribe Business Committee* v. *Weeks*, 430 U.S. 96 (1977))—and given the provision for independent judicial review in the Court of

Federal Claims insofar as petitioners' property rights are concerned—there is nothing anomalous about dismissal of petitioners' challenge because of the absence of the affected Tribes themselves as parties.

b. Petitioners nevertheless contend (Pet. 16-18) that the lower courts erred in concluding that the United States could not adequately address the interests of the absent Tribes. That argument fails. The Tribes' interests in their organization and sovereignty are of such significant import to the Tribes that it would not be appropriate to adjudicate those interests in a case to which they are not parties. As the Tenth Circuit has explained, each absent Tribe has an interest in preserving "its sovereign right not to have its legal duties judicially determined without consent"—"an interest which the United States' presence in this suit cannot protect." *Enterprise Management Consultants, Inc.*, 883 F.2d at 894; see also *Pembina Treaty Committee* v. *Lujan*, 980 F.2d 543, 545-546 (8th Cir. 1992) ("[B]ecause the tribe would have to abide by any process [resulting from the lawsuit,] * * * [t]he tribe obviously has an interest in what that process is, and that interest will not be protected by any other person already a party.").

Furthermore, even if it would be appropriate in certain circumstances for the United States to protect interests like those at stake here, the lower courts did not err in concluding that in this case the United States would not adequately represent the interests of the absent Tribes because of its potentially conflicting obligations to those Tribes and to the individuals involved in this dispute. See Pet. App.

9a-10a; cf. Pet. 16 n.12 (acknowledging that there "[o]bviously * * * is a conflict between petitioners and the United States—petitioners are suing the United States"). To be sure, the United States might not be subject to suit for a breach of its duties simply because it acted in a situation in which it had conflicting interests. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). But the question here is whether it would be fair to the Tribes to proceed in their absence to adjudicate the constitutionality of an Act of Congress granting them sovereignty over their Reservations, based on the view that the United States would represent their interests adequately. In that situation, the decision of the lower courts that the conflicting obligations would prevent the United States from being an adequate representative is entirely reasonable. Petitioners offer no basis for supposing that any other court of appeals would have decided the question differently.[7] Accordingly, that ruling below does not merit review by this Court.[8]

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[7] The only case cited in the relevant portion of the petition, *United States* v. *Mitchell*, 463 U.S. 206 (1983) (cited at Pet. 17), stated that the duties of the federal government towards Indians derive from particular statutes and regulations, rather than a general duty. The case did not involve the question of indispensable parties, and it did not suggest that Indians could not fairly view the United States as operating under a conflict of interest if it attempted to represent the interests of Indian tribes and individuals who had differing views on a particular issue.

[8] Petitioners also err in relying (Pet. 18-19) on the capacity of the four Hoopa tribal officers to represent the absent Tribes. The district court found it "quite clear" that those individuals were "appearing in their individual capacities and not as representatives of the tribe." Pet. App. 21a n.3. Referring to

c. Petitioners also contend (Pet. 14-16) that the lower courts erred in concluding that the "public rights" exception to normal joinder rules should have allowed the suit to proceed. We disagree. The so-called public rights exception arises from this Court's decision in *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350 (1940), which allowed the National Labor Relations Board to enforce an order requiring an employer to desist from unfair labor practices, even though the order might have prejudiced the rights of employees not joined in the proceeding who had contracts with the employer. *Id.* at 359-367. The Court explained that because the "proceeding [was] so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363. The Court noted that the issues in dispute between the Board and the employer were not legally related to the rights asserted by the employees, *id.* at 364, and that the Board's order would "not foreclose the employees from taking any action to secure an adjudication upon the contracts,

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the indirect monetary benefits available to the intervenors under the Act—which might give them an interest distinct from the interests of their Tribe—the court of appeals determined that it could not "with any certainty conclude that the intervenors would be willing to make all of the arguments of the absent tribe." *Id.* at 11a. That conclusion does not warrant review, particularly in the absence of any suggestion that the four individual Hoopas would be adequate representatives of the absent Yurok Tribe. We discern no basis for petitioners' statement (Pet. 17 n.13) that the Yurok Tribe was unfairly denied an opportunity to participate in this litigation; at no time did that Tribe formally attempt to intervene in this case.

nor prejudge their rights in the event of such adjudication," *id.* at 365.

That analysis is entirely inapplicable here. In *National Licorice*, the NLRB sought to enforce an Act of Congress, and thus to give effect to the rights created by that Act. In this case, by contrast, petitioners attack an Act of Congress, and attempt to prevent effectuation of the important public rights that Congress recognized and established in the Hoopa Valley and Yurok Tribes and their respective members. Moreover, in this case, unlike *National Licorice*, the legal entitlements of the Tribes that would be affected adversely are precisely the same as the entitlements petitioners challenge in this case—namely, the entitlements of the Tribes to own and govern their separate reservations under the terms of the Act. For that reason, disposition of this litigation, unlike *National Licorice*, could directly deprive the absent parties of their interests in a way inconsistent with the principles embodied in Rule 19. As the Ninth Circuit explained, "the public rights exception to joinder rules is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties." Pet. App. 12a (brackets and internal quotation marks omitted). Neither of the cases cited by petitioners (Pet. 15-16) rejects that analysis,[9] and petitioners do not suggest that any

[9] Both of those cases restated the rule of *National Licorice* that when litigation seeks the vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff would not thereby become indispensable parties. See *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420, 424 (2d Cir. 1975), cert.

other court has considered application of the public rights exception to issues of tribal sovereignty like those involved here. The question therefore does not merit review by this Court.

2. Finally, petitioners contend (Pet. 10-14) that the lower courts erred in concluding that a suit against the members of the Hoopa Valley Tribal Council would be barred by principles of sovereign immunity. In particular, petitioners contend (Pet. 10-11) that the court of appeals adopted a broad "exception" to the normal rule allowing suits for equitable relief against government officials to bar any such action brought against a tribal official. Petitioners misapprehend the nature of the decision of the court of appeals.

As petitioners note, federal courts traditionally have allowed suits seeking injunctive relief against state officials alleged to be acting under an unconstitutional state statute. *Ex parte Young*, 209 U.S. 123 (1908). Those suits proceed on the theory that an unconstitutional statute is void and thus does not "impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985) (quoting *Ex parte Young*, 209 U.S. at 160). That theory does not, however, allow a plaintiff to circumvent principles of sovereign immunity by suing an officer where the relief sought in the lawsuit inevitably runs against the sovereign itself. As the Court explained in

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denied, 429 U.S. 823 (1976); *Jeffries* v. *Georgia Residential Finance Authority*, 678 F.2d 919, 929 (11th Cir.), cert. denied, 459 U.S. 971 (1982). Neither court suggested that there are no circumstances in which the rights of the absent party are so closely related to the issues addressed in the suit that it would be unfair to proceed without the absent party.

Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949),

> a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

Id. at 691 n.11.

Contrary to petitioners' submission (Pet. 10-12 & n.10), the decision of the court of appeals plainly rested on its analysis of *Larson*, rather than some general notion that *Ex parte Young* does not apply in suits against tribal officers. See Pet. App. 13a-14a (quoting *Larson*, 337 U.S. at 691 n.11, 704). The court's reference to an "intolerable burden" on the tribal government, which petitioners find objectionable (see Pet. 11-12), only identifies the circumstances in which an injunction against an officer will be deemed to "require affirmative action by the sovereign" sufficient to extend the immunity of the sovereign to the suit against its officer. See Pet. App. 14a (noting that "the relief sought in this case would prevent the absent tribes from exercising sovereignty over the reservations allotted to them by Congress," and commenting that "[i]t is difficult to imagine a more intolerable burden on governmental functions") (internal quotation marks omitted).[10]

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[10] The "intolerable burden" formulation was first articulated by the Ninth Circuit in *Washington* v. *Udall*, 417 F.2d 1310, 1318 (1969). Although petitioner does not mention it, two other

The court of appeals acted reasonably in determining that the *Larson* rule barred the suit in this case. The primary relief requested was an injunction "[b]arring [respondents] from subjecting [petitioners] to any practice which treats the joint reservation otherwise than as a single, unified reservation in which every Indian of the reservation alike is entitled to use and benefit from, and to participate in the administration of, reservation lands, resources, and funds in a nondiscriminatory manner." Second Amended Complaint at ¶ 71(b), C.A. E.R. Tab 108, at 66. That relief would go far beyond ordering the cessation of allegedly unconstitutional conduct, because it would commit the Hoopa Valley Tribe to a single course of action, affirmatively requiring it to exercise its sovereign power and to govern its reservation in the particular manner requested by petitioners. Principles of sovereign immunity do not permit petitioners to accomplish such a fundamental restructuring of the Tribe and its territorial sovereignty by the indirect method of suing officials rather than the immune Tribe itself.[11]

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circuits have used the same formulation. See *Clark* v. *United States*, 691 F.2d 837, 840 (7th Cir. 1982) (citing *Udall*); *Saine* v. *Hospital Authority*, 502 F.2d 1033, 1037 (5th Cir. 1974) ("We believe the approach outlined in *Udall* is a sound and workable one.").

[11] See *Morrison* v. *Work*, 266 U.S. 481, 485-486 (1925) (suit against federal officials claiming unconstitutional deprivation of property barred by sovereign immunity because "[t]o interfere with [the United States'] management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States"); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963) (sovereign immunity barred suit

The cases cited by petitioners (Pet. 13) involved only the broader question of whether *Ex parte Young* applies to tribal officials at all, a question the court of appeals answered in petitioners' favor. See Pet. App. 13a-14a. Accordingly, there is no basis for assuming that any other court of appeals would have resolved the immunity question differently on the facts of this unusual case. Hence, the question does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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against federal official challenging decisions regarding disposition of lands pursuant to Hawaii Statehood Act); see also *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963) (sovereign immunity barred suit against federal official where suit would "interfere with the public administration").